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No. _____

In the

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,
Petitioner,

v.

SANTA MONICA RENT CONTROL BOARD,
AN AGENCY OF THE CITY OF SANTA MONICA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
*R.S. RADFORD
*COUNSEL OF RECORD
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Attorneys for Petitioner

113PP

QUESTIONS PRESENTED FOR REVIEW

1. May a state foreclose a remedy of just compensation for a regulatory taking on the grounds that an alternative remedy may be available under the Due Process Clause?

2. Does a citizen whose property is taken by the application of a regulatory scheme forfeit his right to just compensation under the Takings Clause of the Fifth Amendment merely because he acquired the property in question after the enactment of the regulations?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Earl W. Kavanau respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, entered in the above-entitled proceeding on August 26, 1997.

OPINIONS BELOW

The decision of the Supreme Court of the State of California is reported at 16 Cal. 4th 761, 941 P.2d 851, 66 Cal. Rptr. 2d 672 (1997), and is reproduced as Appendix (App.) A. The decision of the California Court of Appeal is unreported and is reproduced as Appendix B. The final order of the Superior Court is unreported and is reproduced as Appendix C. Page references herein are to the versions in the appendices.

JURISDICTION

The final decision of the Supreme Court of the State of California was entered on August 26, 1997. The California court considered and decided the question of whether the confiscatory application of a rent control law requires just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In a 1993 decision,[1] the California Court of Appeal determined that respondent Santa Monica Rent Control Board's (Rent Board's) imposition of an arbitrary cap on annual rent increases was confiscatory as applied to Earl Kavanau's ten-unit apartment building. This ruling allowed Mr. Kavanau to adjust his rents to a level at which he could begin realizing a fair return on his property. However, the Rent Board's unconstitutional actions had deprived Mr. Kavanau of $113,095 in lost rents over nearly four years before the offending regulations were struck down.[2]

When Mr. Kavanau sued for just compensation for this temporary taking, his complaint was dismissed. The California Supreme Court affirmed, ruling that just compensation was not available since Mr. Kavanau had access to a due process remedy--invalidation of the unconstitutional application of the regulations together with the possibility of future rent adjustments by the Rent Board.

With this decision the California Supreme Court reverts to its historic rule that just compensation is not available in California for temporary regulatory takings. This doctrine,

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[1] *Kavanau v. Santa Monica Rent Control Board*, 19 Cal. App. 4th 730 (1993) (*Kavanau I*). The text of this opinion is reproduced as Appendix E to this petition.

[2] *Kavanau v. Santa Monica Rent Control Board*, No. B087620 (1996) (*Kavanau II*), App. B-3.

previously announced in *Agins v. City of Tiburon*,[3] was expressly overruled by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[4] In addition to repudiating *First English*, the decision below conflicts with the well-established principle that constitutional claims should be litigated under explicit textual proscriptions (such as the Fifth Amendment's Takings Clause) if applicable, rather than being swept under the more general provisions of the Due Process Clause.

A. The Rent Board Imposes an Arbitrary Limit on Mr. Kavanau's Ability to Recover His Investment in Capital Improvements to His Property

In 1988, Earl Kavanau purchased a small apartment building in Santa Monica, California, that was badly in need of repair. Over the next year Mr. Kavanau incurred expenses in excess of $140,000 for capital improvements and debt service, while his annualized rental income from the property was only $43,444.[5] Mr. Kavanau applied to the Rent Board for permission to increase his rents by an amount sufficient to recover his outlays on capital improvements and debt service and to cover escalating operating costs. The Board determined that Mr. Kavanau was entitled to increases totaling $35,000 per year. However, the Board also imposed an arbitrary limit of 12% on the increases that could be implemented in any 12-month period, even if this policy demonstrably deprived the owner of a fair return on his property.[6]

B. The Court of Appeal Sets Aside the Rent Board's Application of Its Regulations to Mr. Kavanau as Unconstitutionally Confiscatory

Mr. Kavanau petitioned for a writ of administrative mandamus to set aside the Rent Board's decision. The

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[3] 24 Cal. 3d 266, 277 (1979).
[4] 482 U.S. 304, 310-11 (1987).
[5] *Kavanau I*, App. E-2-3.
[6] App. E-3.

California Court of Appeal found that the Board's imposition of an arbitrary 12% limit was "confiscatory" and therefore unconstitutional as applied to Mr. Kavanau.[7] The appellate panel concluded that Mr. Kavanau was entitled to immediate rent increases to secure a fair return on his full investment, without regard to the Rent Board's 12% cap.[8]

This decision remedied the Rent Board's confiscatory actions *prospectively*, *i.e.*, it allowed Mr. Kavanau to adjust his rents to avoid any *further* losses stemming from the Rent Board's unconstitutional application of its annual cap. However, Mr. Kavanau was left bearing the loss of $113,095 in revenues for the period in which the Board's confiscatory policy was enforced.

C. Following Procedures Required by California Law, Mr. Kavanau Seeks--but Is Denied--Just Compensation for the Rent Board's Temporary Regulatory Taking of His Property

Under procedures created by the California Supreme Court, a claim for compensation for an as-applied regulatory taking must be pursued by an inverse condemnation action joined with or subsequent to a petition for administrative mandamus.[9] Having succeeded on his mandamus claim, in 1994 Mr. Kavanau filed suit in inverse condemnation, seeking just compensation for the Rent Board's temporary regulatory taking of his property. This time a divided panel of the Court of Appeal upheld a trial court's dismissal of Mr. Kavanau's complaint, holding that no compensable taking can occur if the owner retains any use of his property.[10] In dissent, Justice Croskey noted that the Court of Appeal's prior decision in *Kavanau I* already established, as a matter of law, that the Rent Board's application of its regulations to Mr. Kavanau violated

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[7] App. E-4-5.
[8] App. E-6.
[9] *Hensler v. City of Glendale*, 8 Cal. 4th 1, 7, 26 (1994).
[10] *Kavanau II*, App. B-9-10.

the Fifth Amendment's Takings Clause. Therefore, the only question properly before the court in *Kavanau II* was the amount of just compensation owed.[11]

D. The California Supreme Court Rules That Just Compensation for a Regulatory Taking Is Not Available if a Due Process Remedy May Exist

The California Supreme Court affirmed on other grounds. In the decision below, the state high court held that Mr. Kavanau was not entitled to just compensation because

> *a remedy for [a] due process violation, if available and adequate, obviates a finding of a taking.*[12]

In this case, the supposedly "adequate" due process remedy consists of Mr. Kavanau's ability to return to the same Rent Board that unconstitutionally deprived him of a fair return on his property eight years ago. He must submit another petition to the Board and either endure another eight years of litigation or (if the rent adjustments should somehow be granted) attempt to recoup from the tenants of his 10 apartments the $113,095 the Board took from him from 1989 through 1993.[13] Clearly, this remedy cannot be described as adequate in the same sense as just compensation--"a full and perfect equivalent for the property taken."[14] On the contrary, the remedy substituted for just compensation by the court below is speculative at best, if not illusory. Nevertheless, it was considered sufficient to eliminate Mr. Kavanau's Fifth Amendment right to just compensation.

The court below underscored its holding by pronouncing the availability of a due process remedy a "benefit" that in itself fulfills the constitutional mandate of just compensation:

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[11] App. B-10-11.

[12] App. A-20 (emphasis added).

[13] App. A-21-25.

[14] *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

> [T]he Supreme Court has recognized that the benefits a property owner receives in conjunction with a regulation may offset the burdens and thus satisfy the takings clause . . . . Consistent with the reasoning of these cases, . . . *a remedy for the due process violation, if available and adequate, is a valuable benefit that satisfies the takings clause.*[15]

This holding by the court below deprives Earl Kavanau of his Fifth Amendment right to just compensation for the Rent Board's confiscatory application of its arbitrary regulations. More important, it deprives all California property owners of their rights under the Takings Clause. By interpreting the broader and more general protections of the Due Process Clause as a "benefit" that obviates the specific textual guarantee of just compensation, the California court has reverted to its historic doctrine of foreclosing compensation for temporary regulatory takings in California.

REASONS FOR GRANTING THE PETITION

The California Supreme Court has ruled that Earl Kavanau has no compensation remedy under the Fifth Amendment for the temporary regulatory taking of his property if a due process remedy is available. This decision conflicts with the recently enunciated doctrine of the Ninth Circuit Court of Appeals, that a cause of action will not lie for a due process violation if the same facts could give rise to a regulatory takings claim. California citizens who suffer a temporary regulatory taking of their property now face a deadly contradiction: on the same set of facts, the federal courts will not entertain a due process claim, while the state courts will not recognize a just compensation remedy.

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[15] App. A-20 (emphasis added).

The effect of this decision is to return to the rule previously applied in California under *Agins v. City of Tiburon*, that no compensation remedy is available for temporary takings. Under California law, as-applied inverse condemnation claims must be preceded or accompanied by a petition for administrative mandamus seeking to set aside the offending regulatory action as invalid. Yet any application of property regulations that could subsequently be invalidated via a mandamus proceeding would *ipso facto* constitute a violation of due process.[16] By holding that no compensation remedy is available where a due process remedy may be invoked, the California Supreme Court has therefore held that no inverse condemnation claim can be stated for a temporary regulatory taking.

As was the case under *Agins*, this ruling will force California plaintiffs to take their claims for just compensation directly to federal court. Federal jurisdiction for these claims must be recognized because California courts no longer offer a "reasonable, certain and adequate provision" for obtaining just compensation, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[17]

Finally, the court below refused to entertain a just compensation remedy in part because Mr. Kavanau acquired his property after rent control was adopted in Santa Monica. According to the California Supreme Court, this gave Mr. Kavanau "constructive knowledge" that the Rent Board might, at any time in the future, apply its regulations in such a way as to take his property without just compensation.[18] This interpretation of the Fifth Amendment's Takings Clause directly conflicts with holdings of the state courts of Florida,

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[16] *See* Cal. Code of Civ. Proc. § 1094.5 (administrative mandamus will issue if respondent proceeded without or in excess of jurisdiction; petitioner did not receive a fair hearing; or there was prejudicial abuse of discretion).

[17] 473 U.S. 172, 194 (1985).

[18] App. A-18.

Massachusetts, and New Jersey, as well as with this Court's teaching in *Lucas v. South Carolina Coastal Council*[19] and *Nollan v. California Coastal Commission*.[20]

Because the doctrine enunciated by the California Supreme Court in the opinion below conflicts with decisions of the courts of three states and with the holdings of the Court of Appeals for the Ninth Circuit, and because the opinion below effectively repudiates this Court's instruction in *First English*, it is imperative that this Court grant the petition for certiorari and reverse the decision below.

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CALIFORNIA SUPREME COURT AND THE NINTH CIRCUIT COURT OF APPEALS ON WHETHER THE AVAILABILITY OF A DUE PROCESS REMEDY FORECLOSES A FIFTH AMENDMENT TAKINGS CLAIM

The core doctrinal holding of the decision below is that

> a remedy for the due process violation, if available and adequate, obviates a finding of a taking. . . . [A] remedy for the due process violation, if available and adequate, is a valuable benefit that satisfies the takings clause.[21]

This holding conflicts with this Court's doctrine, expressed in a variety of contexts, that

> [w]here a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of governmental

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[19] 505 U.S. 1003, 1029 (1994).

[20] 483 U.S. 825, 833 n.2 (1987).

[21] App. A-20-21.

> behavior, "that Amendment, not the more generalized notions of 'substantive due process,' must be the guide for analyzing [a plaintiff's] claims."[22]

The decision below also conflicts with recent decisions of the Ninth Circuit Court of Appeals which hold that the existence of a regulatory takings claim obviates any cause of action for a due process violation on the same facts.

A. In *Armendariz v. Penman*, the Ninth Circuit Established a Rule That the Availability of a Regulatory Taking Claim Obviates a Due Process Cause of Action

In an en banc decision less than two years ago, the United States Court of Appeals for the Ninth Circuit foreclosed due process claims in federal court if a just compensation claim can be stated on the same facts. In *Armendariz v. Penman*,[23] the Court of Appeals held that the protection of the Fourteenth Amendment's Due Process Clause "does not extend to circumstances already addressed by other constitutional provisions."[24]

In *Armendariz*, the plaintiffs alleged a due process violation based on city officials' overzealous enforcement of housing codes and other ordinances. The Court of Appeals concluded that the plaintiffs' due process claim was "preempted" by the more explicit constitutional protections available under the Takings Clause.[25] Relying on this Court's opinions in *Graham v. Connor*[26] and *Albright v. Oliver*,[27] the Ninth Circuit ruled that "[s]ubstantive due process analysis has

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[22] *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).
[23] 75 F.3d 1311 (9th Cir. 1994).
[24] *Id.* at 1325.
[25] *Id.* at 1318.
[26] 490 U.S. 386.
[27] 510 U.S. 266.

no place in contexts already addressed by explicit textual provisions of constitutional protection," such as the Takings Clause.[28]

The *Armendariz* rule, foreclosing due process claims if a just compensation claim can be stated, has quickly become the accepted doctrine of the Ninth Circuit. Late last year *Armendariz* was applied in *Patel v. Penman*[29] to dismiss a due process claim that had been filed concurrently with an action for inverse condemnation. The Ninth Circuit reiterated its *Armendariz* doctrine that a due process claim was "preempted" by the availability of an action for just compensation based on the same facts.[30] Because the plaintiffs "challenge[d] government conduct that is explicitly limited by the Takings Clause of the Fifth Amendment," which "'provides an explicit source of constitutional protection'" against the city's actions, no substantive due process claim could be brought in federal court.[31]

More recently the Ninth Circuit barred a due process cause of action in *Macri v. King County*,[32] a case decided just seven months ago. In *Macri*, plaintiffs alleged violations of the Takings and Due Process Clauses in state court. The action was removed to federal District Court, which stripped the complaint of the due process cause of action under *Armendariz* and remanded the inverse condemnation claim to state court.[33]

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[28] 75 F.3d at 1325-26.

[29] 103 F.3d 868 (9th Cir. 1996).

[30] *Id.* at 875.

[31] *Id.* at 874-75.

[32] 110 F.3d 1496 (9th Cir. 1997).

[33] *Id.* at 1498. This would be the end of the case if it arose in California under *Kavanau*, because the plaintiff's only remedy is for the due process action that was dismissed by the federal court. However, there is a strong argument that a federal court in California would be required to retain jurisdiction over the inverse condemnation cause of action. *See* Section II, *infra*.

The Ninth Circuit affirmed on what was by then the settled law of the circuit:

> when an explicit textual provision of the Constitution protects against the challenged government action, the claim must be analyzed under that specific provision alone and not under the more general guarantee of substantive due process.[34]

Armendariz, *Patel*, and *Macri* evidence a rule of law in the Ninth Circuit wholly contrary to the decision of the California Supreme Court below: when a given set of facts could support either a due process claim or a suit for just compensation under the Takings Clause, only the just compensation claim may be maintained in federal court.[35]

B. The Decision Below Creates an Irreconcilable Conflict Between the California Courts and the Ninth Circuit on a Question of Federal Constitutional Law: On Identical Facts, State Claimants Would Have No Takings Remedy, While Federal Claimants Would Have No Due Process Cause of Action

In the decision below, the California Supreme Court has determined that just compensation for a taking is not available in the courts of that state if an "adequate" due process remedy exists.[36] Thus, because Earl Kavanau could obtain the due process remedy of invalidation accompanied by a remand to the Rent Board, the California courts will not award compensation for the Board's temporary taking of his property.[37]

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[34] *Id.* at 1498-99 (citing *Armendariz*, 75 F.3d at 1325-26).

[35] *Accord*, Thomas E. Roberts, *Takings, Due Process, and Preemption*, 29 Urb. Law. 399, 406-09 (1997) (noting that under this line of decisions "the Takings Clause subsumes substantive due process" in the Ninth Circuit).

[36] App. A-20.

[37] App. A-20-25.

If Mr. Kavanau had filed his complaint in federal District Court, the holding under *Armendariz* would have been precisely the opposite: because the Fifth Amendment guarantees just compensation for a regulatory taking of his property, Mr. Kavanau would not be able to maintain a claim for a due process violation.

The decision below, in conjunction with *Armendariz*, creates a situation in California where federal plaintiffs are deprived of a cause of action for a due process violation, while state plaintiffs are deprived of a remedy for a taking. Virtually any fact situation that would result in a finding of a regulatory taking could also be recharacterized as a due process violation.[38] Thus, for any given injury, the "correct" constitutional cause of action and available relief are dictated entirely by the plaintiff's choice of forum.

This Court should grant certiorari to reconcile the conflict between the California Supreme Court and the Ninth Circuit and restore uniformity in the treatment of federal constitutional claims.

II

IF THIS COURT DOES NOT ACT, THE DECISION BELOW WILL ONCE AGAIN FORCE CALIFORNIA TAKINGS PLAINTIFFS TO TAKE THEIR CLAIMS DIRECTLY TO FEDERAL COURT

The holding of the court below, denying a compensation remedy for temporary regulatory takings, is not new. The same court came to the same conclusion 18 years ago in *Agins v. City of Tiburon*.[39] Because compensation for a temporary regulatory taking was not available in California courts under *Agins*, plaintiffs asserting their rights under the Takings Clause had no

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[38] *See, e.g.*, Thomas E. Roberts, *Takings, Due Process, and Preemption*, 29 Urb. Law. at 407-08 (category of due process claims is broader than regulatory takings claims, but former subsumes latter).

[39] 24 Cal. 3d 266.

option but to take their claims directly to federal court. This Court overruled *Agins* in 1987, but the same misutilization of federal judicial resources will arise anew under the decision below, which effectively reinstates the *Agins* rule.

A. In *Agins v. City of Tiburon*, the California Supreme Court Declared That Just Compensation Is Not Available for Temporary Regulatory Takings in California

In 1979, the California Supreme Court proclaimed in *Agins v. City of Tiburon* that no compensation remedy was available in that state for temporary regulatory takings.[40] Owners whose property was confiscated by excessive regulation were limited to a due process remedy of invalidation unless the government chose to persist in its unconstitutional actions after a taking had been established in court.[41]

Agins was by no means an isolated aberration. Rather, it was the logical culmination of the California Supreme Court's long-standing policy of protecting governmental entities from financial liability for their restrictive land-use policies, regardless of the impact on private citizens.[42] Just compensation, in the view of the California court, was an "inappropriate and undesirable remedy"[43] because "[c]ommunity planners must be permitted the flexibility which their work requires."[44] Being forced to comply with the United States Constitution would supposedly have a "chilling effect"

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[40] *Id.* at 277 ("mandamus or declaratory relief rather than inverse condemnation is the appropriate relief" for a temporary regulatory taking).

[41] *Id.*

[42] *See, e.g., State of California v. Superior Court (Veta)*, 12 Cal. 3d 237 (1974) (declaratory relief or mandamus held to be sole remedy for unconstitutional land-use regulations); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508 (1975) (no inverse condemnation remedy for zoning ordinance that does not eliminate substantially all use of land).

[43] *Agins*, 24 Cal. 3d at 275.

[44] *Id.*

that would "intimidate legislative bodies and [] discourage the implementation of strict or innovative planning measures."[45] Finally, the California Supreme Court found it necessary to shield local governments from the Takings Clause because "[i]n enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required."[46]

In other words, the expectation of California governments that they would be free of liability under the Takings Clause outweighed the expectation of property owners that the authority of the United States Constitution extended to California.

B. Under *Agins*, California Takings Plaintiffs Took Their Fifth Amendment Claims Directly to Federal Court, Since California Did Not Offer the Adequate State Compensation Remedy Specified in *Williamson County Regional Planning Commission v. Hamilton Bank*

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[47] this Court established that regulatory takings claims are not ripe for adjudication in federal court until the plaintiff "seek[s] compensation through the procedures the State has provided for doing so."[48] This requirement, however, was predicated on the availability of a "'reasonable, certain and adequate provision for obtaining compensation'" in state court.[49]

Because no adequate compensation remedy existed in California under *Agins*, property owners seeking their Fifth

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[45] *Id.* at 276.
[46] *Id.*
[47] 473 U.S. 172.
[48] *Id.* at 194.
[49] *Id.* (citations omitted).

Amendment rights were permitted to take their claims directly to federal court, notwithstanding *Williamson County*. The Ninth Circuit was forced to carve out an exception from this Court's ripeness doctrine in recognition of the fact that "California's compensation procedures were inadequate" under *Agins*.[50]

C. This Court Overruled *Agins* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*

This Court directly confronted and overruled *Agins* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[51] Squarely rejecting the California rule that takings claimants could be limited to a due process remedy, this Court decreed, "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"[52] Accordingly, the *Agins* doctrine was overruled as "inconsistent[] with the requirements of the Fifth Amendment."[53]

D. In Response to *First English*, the California Supreme Court Required Regulatory Takings Claimants to First Seek a Due Process Remedy of Invalidation of the Offending Regulations via Mandamus or Declaratory Relief

In response to *First English*, the California Supreme Court created a stringent new procedural rule limiting claims

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[50] *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). *Accord, e.g., Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989) (federal court had jurisdiction because under *Agins*, "California law prohibited actions seeking just compensation as a remedy for regulatory takings"); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (federal court had jurisdiction because under *Agins*, "no action for inverse condemnation based on a regulatory taking could be brought under California law").

[51] 482 U.S. at 310-11.

[52] *Id.* at 315 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

[53] *Id.* at 311.

for regulatory takings. Under the California rule of *Hensler v. City of Glendale*,[54] as-applied regulatory takings claims must proceed by way of administrative mandamus, subject to a statute of limitations of 90 days or less.[55] Only if a takings claimant succeeds in having the offending regulation invalidated via mandamus may he seek compensation via inverse condemnation.[56] What makes this procedural requirement unique is not so much its doctrinal unsoundness[57] as that it effectively requires plaintiffs to pursue a *due process* claim as a prerequisite to seeking just compensation under the Takings Clause.

Under California law, a petition for administrative mandamus seeks to invalidate the application of a regulation or ordinance as an abuse of discretion[58]--the same inquiry that is applied in due process challenges.[59] Moreover, the remedy of invalidation or recision of the offending measure as applied to the plaintiff in question is universally recognized as a due

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[54] 8 Cal. 4th 1.

[55] *Id.* at 21-28.

[56] *Id.* at 13-14.

[57] It has never been the law that only *invalid* statutes or government actions trigger liability under the Takings Clause.

> The *Hensler* opinion was [unclear] on why injured property owners should be forced to seek an *invalidation* remedy--the only relief provided under the cited code sections--when the *legitimacy* of the regulation may be conceded by the owner from the outset. . . . Until now, it had not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions.

Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepperdine L. Rev. 99, 125 (1994).

[58] Cal. Code of Civ. Proc. § 1094.5(b).

[59] *See, e.g., Kensington University v. Council for Private Postsecondary and Vocational Education*, 54 Cal. App. 4th 27, 30 (1997).

process remedy.[60] Thus, in effect, the initial response of the California Supreme Court to *First English* was to establish that regulatory takings plaintiffs must pursue a due process action before compensation under the Takings Clause will be considered. Compensation via inverse condemnation was no longer foreclosed, as under *Agins*, but was held out as a follow-on possibility for plaintiffs who succeeded in their claim for a due process remedy of invalidation.

E. By Ruling That a Due Process Remedy Obviates a Claim for Just Compensation, the Decision Below Reverts to Agins' Rule That No Compensation Remedy Is Available for Temporary Regulatory Takings in California

In the case at bar, Earl Kavanau complied to the letter with California's rigorous procedural demands. His administrative mandamus petition was filed within 90 days of the Rent Board's confiscatory actions and--most remarkable of all--Mr. Kavanau obtained a judgment from a California appeals court in his favor, finding the Rent Board's regulations to be unconstitutionally "confiscatory" as applied to him.[61] But at that point the door was slammed.

Faced with the prospect of actually subjecting an entity of California government to the discipline of the Takings Clause, the court below determined that a due process remedy was not only a *prerequisite to*, but a *substitute for* just compensation.[62] Because Mr. Kavanau could return to the very Rent Board that had willfully deprived him of a fair return on his property and go through the petitioning process anew, the court below ruled that the availability of these procedures "obviates" a claim for just compensation.[63]

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[60] *See, e.g., Williamson County*, 473 U.S. at 197 ("The remedy for a regulation that goes too far, ***under the due process theory***, is not 'just compensation,' but invalidation of the regulation . . . .") (emphasis added).

[61] *Kavanau I*, App. E-4-6.

[62] App. A-20-21.

[63] *Id.*

By upholding the dismissal of Mr. Kavanau's inverse condemnation complaint, the California Supreme Court effectively repudiated this Court's instruction in *First English* that

> a landowner is entitled to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation."[64]

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation, the decision below forecloses just compensation in nearly every case. The only exceptions will be where the government persists in the application of its regulations after a court pronounced them to be invalid.

But this was precisely the doctrine of the California Supreme Court under *Agins v. City of Tiburon!* Ten years after this Court corrected the court below in *First English*, the *Agins* rule has been resurrected: just compensation is (in theory) available in California for a *permanent* regulatory taking, but never for a temporary one.

Unless this Court acts, the conflict identified in the preceding section will be "resolved" by forcing all California takings plaintiffs into federal court. As was the case under *Agins*, federal jurisdiction will be invoked by regulatory takings claimants because, under *Kavanau*, California courts no longer afford a "reasonable, certain and adequate"[65] provision for obtaining just compensation. This undesirable outcome can be avoided only by granting the petition for certiorari and reversing the court below.

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[64] *First English*, 482 U.S. at 315 (citations omitted).

[65] *Williamson County*, 473 U.S. at 194.

III

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE STATE AND FEDERAL COURTS AS TO WHETHER AN OWNER WHO ACQUIRES REGULATED PROPERTY FORFEITS HIS FIFTH AMENDMENT RIGHTS IF THOSE REGULATIONS ARE SUBSEQUENTLY APPLIED TO CONFISCATE HIS PROPERTY

Even though *Kavanau I* established, as law of the case, that the Rent Board's application of its regulations was unconstitutionally confiscatory as applied to Mr. Kavanau, the court below found that just compensation was not available under the Fifth Amendment. This ruling was based in part on the fact that Santa Monica's rent control law had been enacted prior to Mr. Kavanau's purchase of his property. When the Rent Board subsequently applied this law unconstitutionally, Mr. Kavanau was stripped of his rights under the Fifth Amendment because he supposedly "had constructive knowledge" that the Rent Board might violate the United States Constitution at some future time.[66]

California thus joins New York State in extinguishing the Fifth Amendment rights of citizens who purchase regulated property. The New York Court of Appeals has recently held that the enactment of property regulations comprises an immediate encumbrance on the title of subsequent purchasers.[67] The confiscatory application of such regulations therefore "does not constitute a governmental taking of any property interest owned" by citizens who acquire title after the

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[66] App. A-18.

[67] *See Anello v. Zoning Board of Appeals*, 89 N.Y.2d 535 (1997); *Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603 (1997); *Kim v. City of New York*, 90 N.Y.2d 1(1997); *Basile v. Town of Southhampton*, 89 N.Y.2d 974 (1997).

regulatory scheme is in place.[68] This reasoning was mirrored by the court below, which found that the Rent Board's unconstitutional confiscation of Mr. Kavanau's property comprised only a "minor" interference with his expectations, since the statute supposedly authorizing the Board's unconstitutional actions predated Mr. Kavanau's acquisition of the property.[69]

A. The Decision Below Conflicts with the State Courts of Florida, Massachusetts, and New Jersey on the Important Federal Question of Whether Fifth Amendment Rights Are Extinguished Merely Because a Citizen Acquires Real Property After Land Use Regulations Have Been Adopted

The Florida District Court of Appeal rejected the doctrine of the decision below in *Vatalaro v. Department of Environmental Regulation*.[70] There, the Florida court held that the denial of a permit constituted a regulatory taking of property even though the denial was based on a regulation that existed before the owner acquired her land. This ruling, that a violation of the Takings Clause requires just compensation even if the taking is "authorized" by preexisting legislation, directly conflicts with the California court's ruling that Mr. Kavanau was not entitled to compensation because he had "constructive knowledge" that the Rent Board might violate his constitutional rights.

Similarly, in *Lopes v. City of Peabody*,[71] the Supreme Judicial Court of Massachusetts held that a property owner has a right to compensation for a taking arising from the application

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[68] *Anello v. Zoning Board of Appeals*, 89 N.Y.2d at 540.

[69] App. A-18.

[70] 601 So. 2d 1223, 1229 (5th Dist. Fla.), *review denied*, 613 So. 2d 3 (Fla. 1992).

[71] 32 Mass. App. Ct. 1124, 595 N.E.2d 812, *review denied*, 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, 507 U.S. 981 (1993), *on remand*, 417 Mass. 299, 629 N.E.2d 1312 (1994).

of a land-use restriction predating the owner's acquisition of his land.

The *Lopes* plaintiff acquired a lot that was subject to a wetlands ordinance enacted six years earlier.[72] When the City denied a permit to build a residence on the regulated land, the Massachusetts Supreme Judicial Court ruled that Mr. Lopes had a right to pursue an inverse condemnation remedy even though his property was "subject to the restriction at the time of his purchase."[73]

Finally, the decision below conflicts with the state courts of New Jersey. In *Moroney v. Mayor and Council of the Borough of Old Tappan*,[74] the New Jersey appellate court upheld a finding that a landowner was entitled to pursue a takings remedy for the denial of a building permit based on preexisting zoning regulations. Noting that someone who owned the property prior to the adoption of restrictive zoning could have pursued a takings claim, the New Jersey court ruled that property owners "stand in the shoes of their predecessors in title" to challenge the application of such measures.[75]

In the case at bar, Earl Kavanau was deprived of his right to just compensation under the Takings Clause in part because he acquired title to his property after rent control was imposed in Santa Monica. This ruling directly conflicts with *Vatalaro*, *Lopes*, and *Moroney*, and deepens the conflict among the states on this essential issue of federal constitutional law. This Court should grant certiorari to restore uniformity among

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[72] 417 Mass. at 303, 629 N.E. 2d at 1314-15.

[73] *Id. But see Leonard v. Town of Brimfield*, 423 Mass. 152, 155, 666 N.E.2d 1300, 1303 (1996) (limiting the extent to which a landowner can claim takings damages for a preexisting regulation).

[74] 268 N.J. Super. 458, 633 A.2d 1045 (1993), *cert. denied*, 136 N.J. 295, 642 A.2d 1004 (1994).

[75] 633 A.2d at 1047.

the state courts of California, New York, Florida, Massachusetts, and New Jersey.

B. The Decision Below Would Strip Citizens of Their Right to Just Compensation Whenever Regulated Property Changes Hands, Contrary to This Court's Doctrine in *Lucas* and *Nollan*

In *Lucas v. South Carolina Coastal Council*, this Court held that limitations on the use of property that would otherwise violate the Takings Clause may remain uncompensated only if the limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[76] If these "background principles" are expanded to include any and all restrictive legislation enacted prior to a given owner's purchase of his property, the protections of the Takings Clause would quickly evaporate.

As Justice Holmes observed long ago, when the "seemingly absolute" requirement of just compensation

> is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.[77]

The decision below provides a clear illustration of Justice Holmes' foresight. If the mere enactment of rent control insulates the City of Santa Monica from any claims for compensation based on the unconstitutional application of that law to subsequent buyers of rental property, an ever-growing segment of the population will be deprived of their federal constitutional rights.

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[76] 505 U.S. at 1029.

[77] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

This Court expressly held in *Nollan v. California Coastal Commission* that private ownership rights are not altered merely because property is acquired after a restrictive land-use policy is implemented.[78] The full "bundle" of ownership rights runs with the land: "Prior owners must be understood to have transferred their full property rights" when they convey title.[79] In contrast, under the reasoning employed by the court below, the prior owner's right to pursue a compensation remedy for a taking is extinguished when land changes ownership following the enactment of potentially restrictive regulations.

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be GRANTED.

DATED: November, 1997.

Respectfully submitted,

JAMES S. BURLING
*R.S. RADFORD
*COUNSEL OF RECORD
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Attorneys for Petitioners

[78] 483 U.S. at 833 n.2.
[79] *Id.*

APPENDIX

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IN THE SUPREME COURT OF CALIFORNIA

Earl W. KAVANAU, Plaintiff and Appellant, v. SANTA MONICA RENT CONTROL BOARD, Defendant and Respondent.	No. S051847 Ct. App. 2/3 B087620 Los Angeles County Super. Ct. No. BC 103933

***675** Earl W. Kavanau, in pro. per., Plaintiff and Appellant.

James S. Burling, R.S. Radford, Sacramento, Paul C. Mileck, Berkeley, Sherman L. Stacey, Santa Monica, Kimball & Weiner and George Kimball, Los Angeles, Amici Curiae on behalf of Plaintiff and Appellant.

Anthony A. Trendacosta, Ralph H. Goldsen, Doris Ganga, Karl M. Manheim, Hedges & Caldwell, David Pettit and Joan Mack, Los Angeles, for Defendant and Respondent.

Louise H. Renne, City Attorney, San Francisco, Andrew W. Schwartz, Deputy City Attorney, Richards, Watson & Gershon and Rochelle Browne, Los Angeles, Amici Curiae on behalf of Defendant and Respondent.

CHIN, Justice.

In this case, we consider the inverse condemnation claim of Earl W. Kavanau, a property owner who prevailed in a prior action against the Santa Monica Rent Control Board (Rent Board) on the ground that the rent control regulations of the City of Santa Monica (the City) violated his right to due process of law. The Court of Appeal affirmed the trial court's dismissal order, rejecting Kavanau's inverse condemnation claim because he had not lost "all use of his property." We disagree that a property owner must lose all use of his property in order to have a viable inverse condemnation claim. Nevertheless, we conclude Kavanau is not entitled to maintain an

inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process. Accordingly, we affirm the judgment of the Court of Appeal.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Kavanau's complaint alleges as follows. In 1988, he purchased a 10-unit apartment building in the City. At that time, the building was already subject to the City's rent control law, which limited rent increases to 12 percent per year regardless of increases in landlord expenses. Between November 1, 1988, and October 31, 1989, Kavanau collected rents totaling $43,444 and spent $33,565 operating and maintaining the property, $82,934 improving the property, and $44,000 servicing debt on the property. On November 30, 1989, Kavanau applied to defendant Rent Board for rent increases on nine of the ten units in his building. The Rent Board's hearing examiner determined Kavanau was entitled to rent increases totaling approximately $35,000 per year, but required Kavanau to impose these increases over the course of eight years so as not to exceed the 12 percent limit in any one year. The hearing examiner approved rent increases for the first year totaling $5,184.

Kavanau appealed the hearing examiner's decision to the Rent Board, which upheld the decision. Kavanau then petitioned the superior court for a writ of administrative mandate, which the court denied. Kavanau appealed, and the Court of Appeal reversed. *676 (Kavanau v. Santa Monica Rent Control Bd. (1993) 19 Cal.App.4th 730, 736, 23 Cal.Rptr.2d 724 (Kavanau I).)

In Kavanau I, the Court of Appeal concluded that the 12 percent limit on rent increases deprived Kavanau of "a just and reasonable return" and therefore was unconstitutional. (Kavanau I, supra, 19 Cal.App.4th at p. 736 & fn. 7, 23 Cal.Rptr.2d 724.) The Court of Appeal directed the superior court to issue a writ of mandate prohibiting application of the 12 percent limit to his rent increase petition. (Id. at pp. 736- 737, 23 Cal.Rptr.2d 724.) We denied the Rent Board's petition for review. The Rent Board complied with the superior court's mandate.

Kavanau then filed the complaint in this case, seeking damages for temporary application of the 12 percent limit. In his first cause of action, he alleges he "has suffered a 'taking' and 'damaging' of his property rights" within the meaning of article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution. He seeks "just compensation" in the form of lost rental income and interest. In his second cause of action, Kavanau alleges a violation of his right to due process of law and seeks damages, including emotional distress damages, under 42 United States Code section 1983 (section 1983).

The Rent Board demurred to Kavanau's complaint, and the superior court sustained the demurrer without leave to amend. Kavanau appealed, and the Court of Appeal affirmed. The Court of Appeal noted that Kavanau had abandoned his cause of action under section 1983. As for the cause of action alleging a taking of his property requiring just compensation under the state and federal Constitutions, the Court of Appeal rejected Kavanau's claim because he never lost "all use of his property." For example, he continued to receive rents and enjoy tax benefits, and he could borrow against the property, hold it for investment, convert it to condominiums, or sell it. One justice dissented, stressing that Kavanau I had already decided the Rent Board had applied its regulations in an unconstitutional manner. Because Kavanau lost substantial rental income as a result of this constitutional breach, the dissenting justice argued Kavanau had suffered a taking of his property and should receive just compensation. We granted review in order to consider whether a taking occurred and what, if any, right to just compensation Kavanau might have.

THE CITY'S RENT CONTROL LAW

[1][2][3] Rent control laws must be "reasonably calculated to ... provide landlords with a just and reasonable return on their property." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001 (Birkenfeld).) In order to satisfy this standard, rent control laws incorporate any of a variety of formulas for calculating rent ceilings. (See Baar, Guidelines for Drafting Rent Control Laws: Lessons of a Decade (1983) 35 Rutgers L. Rev. 723, 781-817 (Guidelines) [discussing various rent control formulas].) "Rent control agencies are not obliged by either the state

or federal Constitution to fix rents by application of any particular method or formula." (Carson Mobilehome Park Owners Assn. v. City of Carson (1983) 35 Cal.3d 184, 191, 197 Cal. Rptr. 284, 672 P.2d 1297 (Carson).) Rather, "selection of an administrative standard by which to set rent ceilings is a task for local governments ... and not the courts." (Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 681, 209 Cal.Rptr. 682, 693 P.2d 261 (Fisher); cf. Power Comm'n v. Natural Gas Pipeline Co. of America (1942) 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037 (Pipeline Co.) ["The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas."].)

The City uses a "maintenance of net operating income" formula for calculating rent ceilings. A typical maintenance of net operating income formula presumes the landlord's net operating income at the time rent control began provided a just and reasonable return. In order to maintain this net operating income at a constant level, the law permits rent increases that will enable the landlord to recoup increases in ongoing operating expenses. (See Guidelines, supra, 35 Rutgers L. Rev. at pp. 809-817.) The landlord may also amortize the costs of capital improvements over the useful life of those improvements *677 and pass those costs through to tenants. (See id. at pp. 817-826.) Of course, if the law holds net operating income constant, inflation will erode the real value of that income. Thus, many maintenance of net operating income formulas permit a periodic inflation adjustment. (See Fisher, supra, 37 Cal.3d at p. 683, 209 Cal.Rptr. 682, 693 P.2d 261; cf. Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal.App.3d 280, 289, 195 Cal.Rptr. 825 (Cotati).)

The City's rent control law conforms generally to this model. An April 10, 1979, amendment to the City Charter (Charter) created the Rent Board and empowered it "to regulate rentals ... so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." (Charter, § 1800.) Pursuant to this charter amendment (Charter, § 1803(g)), the Rent Board adopted comprehensive regulations (Rent Board Regulations).

The Charter amendment rolled back most residential rents in the City to their level on April 10, 1978. (Charter, § 1804(b); Rent Bd. Regs., regs. Nos. 7000-7001.) This rollback established the base rent

for individual rental units in the City. (Charter, § 1804(b).) To accommodate subsequent changes in landlord expenses, the Rent Board has since authorized various general rent adjustments and surcharges. (Charter, § 1805(a), (b); Rent Bd. Regs., regs. Nos. 3000- 3106.) In addition, a landlord can petition for an individual rent adjustment in lieu of applicable general adjustments (Charter, § 1805(c); Rent Bd. Regs., regs. Nos. 4100-4114), in which case a hearing examiner receives evidence and prepares a decision, including findings of fact and law (Charter, § 1805(d); Rent Bd. Regs., regs. Nos. 4007-4020). Either party may appeal the hearing examiner's decision to the Rent Board. (Charter, § 1805(d)(10); Rent Bd. Regs., reg. No. 4021.)

The Rent Board Regulations define net operating income as gross income less operating expenses. (Rent Bd. Regs., regs. Nos. 4101(a), 4104.) The Rent Board Regulations also establish a presumption that the net operating income during the 1978 calendar year provided a landlord with a fair return. (Rent Bd. Regs., reg. No. 4102.) A landlord can rebut this presumption by showing that operating expenses during 1978 were unusually high (Rent Bd. Regs., reg. No. 4103A) or that base rent was unusually low (Rent Bd. Regs., reg. No. 4103B). A landlord is entitled not only to maintain 1978 net operating income (Rent Bd. Regs., reg. No. 4102), but also to petition for rent increases that will increase net operating income at a rate equal to 40 percent of any increase in the consumer price index (Rent Bd. Regs., reg. No. 4106).

To establish an erosion of net operating income, and therefore entitlement to a rent increase, a landlord may present evidence of an increase in operating expenses. Under the Rent Board Regulations, operating expenses include capital improvement costs (Rent Bd. Regs., reg. No. 4101(c)(1) (viii)), but the landlord must amortize these costs over their useful life in accordance with an amortization schedule (Rent Bd. Regs., reg. No. 4041(a)-(c)).

At the time Kavanau improved his property, a landlord who had no financing costs could include an imputed interest cost as part of his capital improvement costs. (Former Rent Bd. Regs., reg. No. 4041(d).) Also at that time, a capital improvement rent increase lapsed once the amortization period ended (i.e., once the landlord had recouped all the costs associated with the improvement). (Former

Rent Bd. Regs., reg. No. 4041(e).) Under current Rent Board Regulations, a capital improvement rent increase is permanent, allowing the landlord eventually to recoup more than his total cost. (Rent Bd. Regs., reg. No. 4041(c).)

The Rent Board Regulations protect tenants from sudden, large rent increases by delaying rent increases that would otherwise be permissible. At the time the Court of Appeal decided Kavanau I, a landlord could not increase rent more than 12 percent in any 12-month period, except in "extraordinary circumstances" such as an earthquake. (Former Rent Bd. Regs., reg. No. 4107(a), (f).) This 12 percent limit is central to the dispute in this case. Current Rent Board Regulations impose this limit only in the case ***678** of tenant hardship. (Rent Bd. Regs., reg. No. 4107(a).)

DISCUSSION

Two independent constitutional protections are at issue in this case. The due process clauses of the state and federal Constitutions guarantee property owners "due process of law" when the state "deprive[s] [them] of ... property." (Cal. Const., art. I, §§ 7, 15; U.S. Const., 14th Amend., § 1.) On the other hand, the takings clauses of the state and federal Constitutions guarantee property owners "just compensation" when their property is "taken for public use." (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.) These distinct constitutional protections limit the legislative power of government in different but related ways. The due process protection focuses on the government's means and purpose: whether the government's method rationally furthers legitimate ends. The takings protection focuses on the impact of the government's action: whether the government has in effect appropriated private property for its own use, rather than merely regulating a private use of the property. This conceptual distinction, however, blurs somewhat in cases applying the due process and takings clauses to price regulations, including rent control. In that context, courts sometimes employ overlapping terminology and standards, treating the two clauses as a single constitutional protection of private property rights.

Deprivation of Property Without Due Process of Law

[4][5] The state and federal Constitutions prohibit government from depriving a person of property without due process of law.

(Cal. Const., art. I, §§ 7, 15; U.S. Const., 14th Amend., § 1.) These provisions guarantee appropriate procedural protections (see, e.g., Goldberg v. Kelly (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287) and also place some substantive limitations on legislative measures (see, e.g., Washington v. Glucksberg (1997) --- U.S. ----, 117 S.Ct. 2258, 138 L.Ed.2d 772; U.S. v. Carolene Products Co. (1938) 304 U.S. 144, 58 S.Ct. 778, 82 L. Ed. 1234; Nebbia v. New York (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (Nebbia)). The latter guaranty--sometimes described as substantive due process--prevents government from enacting legislation that is "arbitrary" or "discriminatory" or lacks "a reasonable relation to a proper legislative purpose." (Nebbia, supra, 291 U.S. at p. 537, 54 S.Ct. at p. 516.)

[6][7][8][9][10][11] In the context of price control, which includes rent control, courts generally find that a regulation bears "a reasonable relation to a proper legislative purpose" so long as the law does not deprive investors a "fair return" and thereby become "confiscatory." (Pipeline Co., supra, 315 U.S. at pp. 584, 585, 62 S.Ct. at pp. 742-743; see also Power Comm'n v. Hope Natural Gas Co. (1944) 320 U.S. 591, 602-603, 64 S.Ct. 281, 287-288, 88 L.Ed. 333 (Hope Gas); 20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 292-296, 32 Cal.Rptr.2d 807, 878 P.2d 566 (20th Century); Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 816, 258 Cal.Rptr. 161, 771 P.2d 1247 (Calfarm); Guidelines, supra, 35 Rutgers L.Rev. at pp. 781- 817.) Determining prices that will provide a fair return "involves a balancing of the investor and the consumer interests." (Hope Gas, supra, 320 U.S. at p. 603, 64 S.Ct. at p. 288.) "It is the product of expert judgment which carries a presumption of validity." (Id. at p. 602, 64 S.Ct. at pp. 287- 288.) A reviewing court focuses on whether the regulatory agency took relevant investor interests into account. (Permian Basin Area Rate Cases (1968) 390 U.S. 747, 770, 88 S.Ct. 1344, 1361-1362, 20 L. Ed.2d 312 (Permian Basin); Pipeline Co., supra, 315 U.S. at p. 586, 62 S.Ct. at p. 743.) One of these investor interests is a "return ... commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to ... attract capital." (Hope Gas, supra, 320 U.S. at p. 603, 64 S.Ct. at p. 288.) Though due process protections generally focus on method, not result, in the context of price regulation "it is the

result reached not the method employed which is controlling. [Citations.] It is not theory but the impact of the [price regulation] which counts." (Id. at p. 602, 64 S.Ct. at pp. 287- 288.) In sum, when considering *679 whether a price regulation violates due process, a "court must determine whether the [regulation] may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection for the relevant public interests, both existing and foreseeable." (Permian Basin, supra, 390 U.S. at p. 792, 88 S.Ct. at p. 1373.)

We applied these due process standards to rent control laws in Fisher, supra, 37 Cal.3d 644, 209 Cal. Rptr. 682, 693 P.2d 261, Carson, supra, 35 Cal.3d 184, 197 Cal.Rptr. 284, 672 P.2d 1297, and Birkenfeld, supra, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001. Though the state and federal Constitutions do not mandate a particular administrative formula for measuring fair return (Fisher, supra, 37 Cal.3d at p. 681, 209 Cal.Rptr. 682, 693 P.2d 261), we did note certain characteristics that would weigh in favor of a finding of constitutionality. For example, due to the effects of inflation, the law "may not indefinitely freeze the dollar amount of ... profits without eventually causing confiscatory results." (Id. at p. 683, 209 Cal.Rptr. 682, 693 P.2d 261, original italics.) In addition, when a rent control law establishes a "base rent" by reference to rents on a specified date, the law should permit adjustments of that base rent for those rental units that had artificially low rents at that time. (Birkenfeld, supra, 17 Cal.3d at p. 168, 130 Cal.Rptr. 465, 550 P.2d 1001.) Similarly, the law should permit individualized rent adjustments in appropriate cases even if base rent was not artificially low (Fisher, supra, 37 Cal. 3d at pp. 689-690, 209 Cal.Rptr. 682, 693 P.2d 261), and the procedural mechanism by which landlords may obtain any of these adjustments must not be prohibitively burdensome (Birkenfeld, supra, 17 Cal.3d at pp. 169-171, 130 Cal.Rptr. 465, 550 P.2d 1001; see also Fisher, supra, 37 Cal.3d at p. 690, 209 Cal.Rptr. 682, 693 P.2d 261). Among other things, this process may not entail "a substantially greater incidence and degree of delay than is practically necessary." (Birkenfeld, supra, 17 Cal.3d at p. 169, 130 Cal.Rptr. 465, 550 P.2d 1001; see also Fisher, supra, 37 Cal.3d at p. 687, 209 Cal.Rptr. 682, 693 P.2d 261.) In this regard, we recommended that the law permit "general rental adjustments for all or any class of rental units based

on generally applicable factors." (Birkenfeld, supra, 17 Cal.3d at p. 171, 130 Cal.Rptr. 465, 550 P.2d 1001; see also Fisher, supra, 37 Cal.3d at p. 687, 209 Cal.Rptr. 682, 693 P.2d 261; but see Carson, supra, 35 Cal.3d at p. 194, 197 Cal.Rptr. 284, 672 P.2d 1297.) We also indicated rent control laws should (1) allow landlords to petition for rent adjustments without having to prove building code compliance, (2) allow the governing agency to consolidate petitions for rental units in the same building, and (3) allow the governing agency to delegate hearings on petitions to hearing officers. (Birkenfeld, supra, 17 Cal.3d at pp. 170-171, 130 Cal.Rptr. 465, 550 P.2d 1001; see also Fisher, supra, 37 Cal.3d at pp. 690-691, 209 Cal.Rptr. 682, 693 P.2d 261.) All these characteristics would serve to reduce delay and make the petition process less burdensome to landlords, but we did not hold the state or federal Constitution required any of them per se.

[12] Of course, the fair return principle is not limited to the property as it was when the landlord purchased it. A landlord is also entitled to a fair return on necessary capital improvements. (Sierra Lake Reserve v. City of Rocklin (9th Cir.1991) 938 F.2d 951, 958, vacated in part (1993) 987 F.2d 662; see also Guaranty Nat. Ins. Co. v. Gates (9th Cir.1990) 916 F.2d 508, 515.) For example, if a landlord retrofits an older building in order to comply with new building code requirements, the capital improvements may be the larger part of the building's value. In that case, if fair return did not take those capital improvements into consideration, it would be an empty promise. As the high court noted in Duquesne Light Co. v. Barasch (1989) 488 U.S. 299, 310, 109 S.Ct. 609, 617, 102 L.Ed.2d 646 (Duquesne), "fair rate of return" depends on "the amount of capital upon which the investors are entitled to earn that return." (See also Hope Gas, supra, 320 U.S. at p. 603, 64 S.Ct. at p. 288 ["return ... should be sufficient ... to attract capital"].) Thus, a rent control law that merely allows a landlord to recoup the bare cost of a necessary capital improvement runs the risk of ***680** being confiscatory and thereby violating the landlord's right to due process of law.

Taking of Property Without Just Compensation

[13] The state and federal Constitutions prohibit government from taking private property for public use without just compensation. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.; Chicago,

Burlington & Q.R. Co. v. Chicago (1897) 166 U.S. 226, 239, 17 S.Ct. 581, 585-586, 41 L.Ed. 979 [applying the federal takings clause to the states].) In Pa. Coal Co. v. Mahon (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (Pa. Coal), the United States Supreme Court recognized that a regulation of property that "goes too far" may effect a taking of that property, though its title remains in private hands. In such a case, the property owner may bring an inverse condemnation action, and if it prevails, the regulatory agency must either withdraw the regulation or pay just compensation. (First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 317, 321, 107 S.Ct. 2378, 2387, 2389, 96 L.Ed.2d 250.) Even if the agency withdraws the regulation, the property owner may have a right to just compensation for the temporary taking while the regulation was in effect. (Id. at p. 321, 107 S.Ct. at p. 2389 [finding this right "where the government's activities have ... worked a taking of all use of property"].)

The United States Supreme Court has struggled to articulate a standard for when a regulation "goes too far" and effects a taking. The court has stated broadly that the takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (Armstrong v. United States (1960) 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554.) Nevertheless, the court has concluded that the inquiry in any particular case is "essentially ad hoc" (Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (Penn Central)) and "a question of degree [that] ... cannot be disposed of by general propositions" (Pa. Coal, supra, 260 U.S. at p. 416, 43 S.Ct. at p. 160). The court has, however, identified "two discrete categories of regulatory action" that constitute a taking. (Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L.Ed.2d 798 (Lucas).) Thus, the court has held that a permanent physical invasion of property, no matter how slight, effects a taking requiring compensation. (Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 421, 102 S.Ct. 3164, 3168, 73 L.Ed.2d 868.) Similarly, the court has held that a regulation that deprives a property owner of "all economically beneficial or productive use of land" effects a taking requiring just compensation. (Lucas, supra, 505 U.S. at p. 1015, 112 S.Ct. at p. 2893; Agins v.

Tiburon (1980) 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106.)

[14] A regulation, however, may effect a taking though, as is true here, it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property. In Lucas, the high court expressly rejected the "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." (Lucas, supra, 505 U.S. at p. 1019, fn. 8, 112 S.Ct. at p. 2895, fn. 8.) "Such an owner" merely lost "the benefit of [the court's] categorical formulation." (Ibid.; see also Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 831, 107 S.Ct. 3141, 3145-3146, 97 L.Ed.2d 677 (Nollan).) Of course, we held in Agins v. City of Tiburon (1979) 24 Cal.3d 266, 277, 157 Cal.Rptr. 372, 598 P.2d 25, "that a zoning ordinance may be unconstitutional ... only when its effect is to deprive the landowner of substantially all reasonable use of his property." (See also Fisher, supra, 37 Cal.3d at p. 686, 209 Cal.Rptr. 682, 693 P.2d 261 [paraphrasing and citing Agins v. City of Tiburon].) But the regulation at issue in Agins v. City of Tiburon left the plaintiffs a substantial use of their five-acre property, including building as many as five single-family homes on it. In order to uphold the regulation, we did not need to limit the protections of the takings clause to total deprivations of "substantially all reasonable use" of property, because the case before us did not even approach a total deprivation. Thus, our holding was dictum. Moreover, Lucas makes clear we misinterpreted ***681** the federal Constitution, and nothing in our opinion in Agins v. City of Tiburon suggests we were interpreting the state takings clause more narrowly than the federal clause. Finally, even if we did intend to interpret the state right more narrowly than the federal right, the federal Constitution would nevertheless apply here to protect Kavanau.

[15] When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the "factors" the high court discussed in Penn Central and subsequent cases. Penn Central emphasized three factors in particular: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." (Penn Central, supra, 438 U.S. at p. 124, 98 S.Ct. at p. 2659;

MacDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 349, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285; Kaiser Aetna v. United States (1979) 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332.) Subsequent cases, as well as a close reading of Penn Central, indicate other relevant factors: (1) whether the regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes" (Penn Central, supra, 438 U.S. at p. 125, 98 S.Ct. at pp. 2659-2660); (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's "primary expectation" (id. at pp. 125, 136, 98 S.Ct. at pp. 2659-2660, 2665); (3) "the nature of the State's interest in the regulation" (Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 488, 107 S.Ct. 1232, 1243, 94 L.Ed.2d 472 (Keystone); see also Mugler v. Kansas (1887) 123 U.S. 623, 668-669, 8 S.Ct. 273, 300-301, 31 L.Ed. 205) and, particularly, whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose" (Penn Central, supra, 438 U.S. at p. 127, 98 S.Ct. at p. 2660); (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader (id. at pp. 127-128, 98 S.Ct. at pp. 2660-2661); (5) whether the government is acquiring "resources to permit or facilitate uniquely public functions" such as government's "entrepreneurial operations" (id. at pp. 128, 135, 98 S.Ct. at pp. 2661, 2664-2665); (6) whether the regulation "permit[s the property owner] ... to profit [and] ... to obtain a 'reasonable return' on ... investment" (id. at p. 136, 98 S.Ct. at p. 2665); (7) whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed" (id. at p. 137, 98 S.Ct. at p. 2666; Keystone, supra, 480 U.S. at p. 491, 107 S.Ct. at p. 1245; Agins v. Tiburon, supra, 447 U.S. at p. 262, 100 S.Ct. at p. 2142); (8) whether the regulation "prevent[s] the best use of [the] land" (Ibid.); (9) whether the regulation "extinguish[es] a fundamental attribute of ownership" (ibid.); and (10) whether the government is demanding the property as a condition for the granting of a permit (Dolan v. City of Tigard (1994) 512 U.S. 374, 385, 114 S.Ct. 2309, 2316-2317, 129 L.Ed.2d 304 (Dolan); Nollan, supra, 483 U.S. at pp. 831, 841, 107 S.Ct. at pp. 3145-3146, 3150- 3151).

This list is not a comprehensive enumeration of all the factors that might be relevant to a takings claim, and we do not propose a single analytical method for these claims. Rather, we simply note factors the high court has found relevant in particular cases. Thus, instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering. Recent Supreme Court decisions suggest a two-part analysis that considers the economic effects of the regulation and the government's purpose. (Yee v. Escondido (1992) 503 U.S. 519, 523, 112 S. Ct. 1522, 1526, 118 L.Ed.2d 153; Keystone, supra, 480 U.S. at pp. 484-485, 107 S.Ct. at pp. 1241-1242.) With respect to the latter consideration, the high court has declared that a regulation of property "effects a taking if [it] does not substantially advance legitimate state interests." (Agins v. Tiburon, supra, 447 U.S. at p. 260, 100 S.Ct. at p. ***682** 2141; see also Dolan, supra, 512 U.S. at p. 385, 114 S. Ct. at pp. 2316-2317; Lucas, supra, 505 U.S. at p. 1016, 112 S.Ct. at pp. 2893-2894; Nollan, supra, 483 U.S. at p. 834, 107 S.Ct. at p. 3147; Keystone, supra, 480 U.S. at p. 485, 107 S.Ct. at pp. 1241- 1242; United States v. Riverside Bayview Homes, Inc. (1985) 474 U.S. 121, 126, 106 S.Ct. 455, 458-459, 88 L. Ed.2d 419.) But, outside the context of permit condition cases such as Nollan and Dolan, the court has not clarified how it would apply this standard, and, in particular, the extent to which it would apply the standard in the same way as the similarly worded due process standard. (Cf. Nollan, supra, 483 U.S. at p. 834, fn. 3, 107 S.Ct. at p. 3147, fn. 3 [stating that the standards are "quite different"]; Dolan, supra, 512 U.S. at p. 391, 114 S.Ct. at pp. 2319-2320 [articulating a " 'rough proportionality' " standard for permit condition cases].)

Penn Central, supra, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, of course did not involve a price regulation. In the context of price regulation, the high court has sometimes employed an analysis under the takings clause similar to that which it employs under the due process clause, focusing on the regulation's impact and investors' ability to earn a fair return. In Duquesne, for example, an electric utility argued that electricity rates constituted a taking because the rate-setting agency did not include certain costs in the rate base. (Duquesne, supra, 488 U.S. at p. 305, 109 S.Ct. at p. 614.) Though the court was addressing a takings issue, it did not cite Penn Central.

Instead, it cited due process cases, including Permian Basin, supra, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312, Hope Gas, supra, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, and Pipeline Co., supra, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037, and applied a "fair return" analysis similar to the analysis it had traditionally applied in due process cases. (Duquesne, supra, 488 U.S. at pp. 307-310, 109 S.Ct. at pp. 615-617; see also FCC v. Florida Power Corp. (1987) 480 U.S. 245, 250-254, 107 S.Ct. 1107, 1111-1113, 94 L.Ed.2d 282 (Florida Power) [also applying what appears to be a due process analysis when reviewing a price regulation under the takings clause]; 20th Century, supra, 8 Cal.4th at pp. 292-296, 32 Cal.Rptr.2d 807, 878 P.2d 566 [same]; Cotati, supra, 148 Cal.App.3d at p. 293, 195 Cal.Rptr. 825 [a breach of the due process clause in the context of rent control "might well violate" the takings clause]; 2 Rotunda & Nowak, Treatise on Constitutional Law (2d ed.1992) § 15.12, p. 505, fn. 59 ["Early Supreme Court opinions concerning utility rate regulation were written in terms of 'due process of law', but those opinions are now understood as establishing principles identical to those inherent in the takings clause...."]; Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon (1996) 106 Yale L.J. 613, 672, fn. 270 ["More recently, the Court has once again seemed to graft what was originally a due process test of governmental authority onto the Takings Clause ...."]; but see Yee v. Escondido, supra, 503 U.S. at p. 529, 112 S.Ct. at p. 1529 [suggesting that traditional takings clause jurisprudence applies to rent regulations]; Pennell v. San Jose (1988) 485 U.S. 1, 8-14, 108 S.Ct. 849, 855-859, 99 L. Ed.2d 1 [treating the takings clause and the due process clause separately when deciding a constitutional challenge to a rent control law].)

Court of Appeal Decision in Kavanau I

In Kavanau I, the Court of Appeal determined that the Rent Board's application of its 12 percent limit to Kavanau's petition for rent increases was unconstitutional. Though the court did not state whether it found a violation of Kavanau's due process rights or a taking without just compensation, the court applied a due process analysis and relied on our decisions in Calfarm, supra, 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247, Fisher, supra, 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261, and Birkenfeld, supra, 17 Cal.3d

129, 130 Cal.Rptr. 465, 550 P.2d 1001, which were all due process cases. (Kavanau I, supra, 19 Cal. App.4th at pp. 734- 735, 23 Cal. Rptr.2d 724.) Thus, we conclude the court did not find a taking.

We question some of the Court of Appeal's reasoning in Kavanau I. For example, that court implied that the state and federal Constitutions require application of the "fair return ***683** on investment" formula for setting rent ceilings. (Kavanau I, supra, 19 Cal.App.4th at pp. 733, 735, 23 Cal.Rptr.2d 724; for a discussion of the fair return on investment formula, see Guidelines, supra, 35 Rutgers L.Rev. at pp. 790- 796.) Though we have used the phrase "just and reasonable return" (Birkenfeld, supra, 17 Cal.3d at p. 165, 130 Cal.Rptr. 465, 550 P.2d 1001), we have never held that either the state or federal Constitution requires application of the fair return on investment formula or any other specific formula. (Fisher, supra, 37 Cal.3d at p. 681, 209 Cal. Rptr. 682, 693 P.2d 261 [rejecting argument that Constitution requires application of the circular "fair return on market value" formula]; Carson, supra, 35 Cal.3d at p. 191, 197 Cal. Rptr. 284, 672 P.2d 1297.)

In addition, rather than amortizing the costs of Kavanau's capital improvements over their useful life, the Court of Appeal apparently treated those costs in the same way as ongoing operating or maintenance costs. (Kavanau I, supra, 19 Cal.App.4th at p. 736, fn. 7, 23 Cal.Rptr.2d 724.) The court also apparently included as capital improvement costs certain expenditures the Rent Board had found unnecessary. (Ibid.) As a result, the court determined that Kavanau incurred a large deficit.

[16][17] Moreover, the Court of Appeal assumed the City's maintenance of net operating income formula without the 12 percent limit established the minimum "fair return" under the state and federal Constitutions. (Kavanau I, supra, 19 Cal. App. 4th at p. 733, 23 Cal.Rptr.2d 724.) Based on this assumption, the Court of Appeal concluded the 12 percent limit put Kavanau's return below the constitutional minimum. But the court did not explain why the 12 percent limit could not be one aspect of a comprehensive scheme that as a whole provided landlords a fair return. (Cf. Pennell v. San Jose, supra, 485 U.S. at pp. 13-14, 108 S.Ct. at pp. 858-859.) "The economic judgments required in rate proceedings are often hopelessly complex.... The Constitution is not designed to arbitrate these

economic niceties." (Duquesne, supra, 488 U.S. at p. 314, 109 S.Ct. at p. 619.) Thus, courts do not "examine[ ] piecemeal" the "subsidiary aspects of [a state agency's] ratemaking methodology" (id. at p. 313, 109 S.Ct. at pp. 618-619), and flexibility in one part of a regulatory scheme may offset restrictiveness in another (id. at p. 314, 109 S.Ct. at p. 619). We see no reason why a reasonable annual limit on rent increases cannot be consistent with a fair return.

Furthermore, the City could have prohibited certain capital improvements altogether, perhaps as a way of keeping a stock of housing available for low income residents. Thus, the City could at its option permit those capital improvements, but encourage landlords to limit their magnitude by prohibiting rent increases in excess of 12 percent per year regardless of the improvements' cost. (Cf. Nollan, supra, 483 U.S. at pp. 836-837, 107 S.Ct. at pp. 3148-3149.)

[18] Finally, the essential inquiry in due process cases involving price controls is whether the regulatory scheme's result is just and reasonable. (Hope Gas, supra, 320 U.S. at p.602, 64 S.Ct. at pp. 287-288.) The Court of Appeal did not expressly find that the 12 percent limit prevented Kavanau from " 'operating successfully.' " (20th Century, supra, 8 Cal.4th at p. 295, 32 Cal.Rptr.2d 807, 878 P.2d 566.) Rather, the 12 percent limit merely delayed Kavanau's rent increase. Regulated prices must fall within a "broad zone of reasonableness" to be constitutional (Permian Basin, supra, 390 U.S. at p. 770, 88 S.Ct. at pp. 1361-1362; see also Pipeline Co., supra, 315 U.S. at p. 585, 62 S.Ct. at pp. 742-43), and due process requires fundamentally a balancing of interests (Hope Gas, supra, 320 U.S. at p. 603, 64 S.Ct. at p. 288). The 12 percent limit achieved this balance. It balanced landlords' interests in recouping their increased costs against tenants' interests in avoiding sudden, large rent increases. Of course, in certain circumstances-- such as during times of very high inflation--a 12 percent limit on rent increases might be confiscatory, but the Court of Appeal did not adequately explain why application of the 12 percent limit to Kavanau's petition for rent increases violated his constitutional rights.

[19] Thus we have serious doubts about the Court of Appeal's reasoning in Kavanau ***684** I. Nevertheless, the Court of Appeal's judgment in that case is final and precludes relitigation of certain issues in this proceeding. (See, e.g., Perez v. City of San Bruno

(1980) 27 Cal. 3d 875, 883, 168 Cal.Rptr. 114, 616 P.2d 1287.) For example, we must accept as true for purposes of this proceeding that application of the Rent Board's 12 percent limit on rent increases violated Kavanau's right to due process of law. Of course, Kavanau obtained a remedy in the form of a writ of mandate, but he also seeks damages.

Kavanau's Present Claim for Damages

In Hensler v. City of Glendale (1994) 8 Cal.4th 1, 14, 32 Cal. Rptr.2d 244, 876 P.2d 1043, we held that, if a property owner brings a timely action to set aside or void a regulation, he may but need not join a claim for damages. Instead, he may bring a damages claim separately after successfully challenging the regulation. (Id. at pp. 7, 26, 32 Cal.Rptr.2d 244, 876 P.2d 1043.) Thus, in Hensler we identified an exception to the general rule against splitting claims. (See also Healing v. California Coastal Com. (1994) 22 Cal. App.4th 1158, 1170, 27 Cal. Rptr.2d 758; Mata v. City of Los Angeles (1993) 20 Cal. App.4th 141, 149, 24 Cal. Rptr.2d 314; Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal.App.4th 592, 607, 11 Cal.Rptr.2d 824; Gallagher v. Frye (9th Cir.1980) 631 F.2d 127, 130.) In accordance with Hensler, Kavanau brought his present claim for damages, alleging two causes of action.

In his second cause of action, Kavanau sought damages based on the violation of his right to due process. The state and federal due process clauses, unlike the takings clauses, make no express reference to damages, but Kavanau alleged a "deprivation of ... rights, privileges, or immunities secured by the Constitution," entitling him to damages under section 1983. We need not determine whether section 1983 would allow Kavanau to recoup damages under the facts of this case, because he abandoned his section 1983 cause of action, choosing instead "[t]o focus attention on what [he] believes to be the important constitutional questions involved ... [in] his first cause of action for inverse condemnation...." The Court of Appeal expressly noted that Kavanau had abandoned the section 1983 cause of action, and he did not petition for rehearing. Accordingly, the only cause of action before us is Kavanau's first cause of action alleging a taking and seeking just compensation. (See Cal. Rules of Court, rule 29(b).)

[20][21] Kavanau's allegations, if true, are not sufficient to establish a taking, and therefore the trial court was correct to sustain

the Rent Board's demurrer. This case does not fall within either of the "two discrete categories of regulatory action" that constitute a taking. (Lucas, supra, 505 U.S. at p. 1015, 112 S.Ct. at p. 2893; Agins v. Tiburon, supra, 447 U.S. at p. 260, 100 S.Ct. at p. 2141.) Rent control does not generally constitute a physical invasion of property (Yee v. Escondido, supra, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153), and we agree with the Court of Appeal that Kavanau has not lost "all economically beneficial or productive use of" his property (Lucas, supra, 505 U.S. at p. 1015, 112 S.Ct. at p. 2893).

[22] Nor do the factors the high court articulated in Penn Central and subsequent cases indicate a taking in this case. The "economic impact" (Penn Central, supra, 438 U.S. at p. 124, 98 S.Ct. at p. 2659) on Kavanau of the 12 percent limit, which in effect merely delayed his rent increase, was not significant when compared to the benefits he continued to receive from his property, including significant rental income (id. at p. 130, 98 S.Ct. at p. 2662 [rejecting assertion that a reviewing court should consider the property interest that a regulation affects in isolation from unaffected property interests]). Similarly, the "interfere[nce] with [Kavanau's] distinct investment-backed expectations" (id. at p. 124, 98 S. Ct. at p. 2659) was minor, considering he had constructive knowledge of the 12 percent limit when he chose to improve his property. Finally, the "character of the governmental action" (ibid.) does not compel us to find a taking.

This case does not involve a regulation that "prohibited a beneficial use to which [Kavanau's building] had previously been devoted" (Penn Central, supra, 438 U.S. at p. 125, 98 S.Ct. at pp. 2659-2660), thus interfering with ***685** Kavanau's "primary expectation" (id. at p. 136, 98 S.Ct. at p. 2665). Rather, the 12 percent limit affected Kavanau largely because he changed the use of his building by making costly capital improvements. Nor did the 12 percent limit abrogate Kavanau's entire property holding, as might occur when someone owns only mineral rights and a land-use regulation prohibits mining those minerals. (Pa. Coal, supra, 260 U.S. at pp. 412-416, 43 S.Ct. at pp. 159-160; Penn Central, supra, 438 U.S. at pp. 127-128, 98 S. Ct. at pp. 2660-2661.) Furthermore, by imposing the 12 percent limit, the Rent Board was not acquiring "resources to permit or facilitate uniquely public functions" such as government's "entrepreneurial operations." (Penn Central,

supra, 438 U.S. at pp. 128, 135, 98 S.Ct. at pp. 2661, 2664-2665.) Nor did the 12 percent limit "prevent the best use" of Kavanau's building or "extinguish a fundamental attribute of ownership." (Agins v. Tiburon, supra, 447 U.S. at p. 262, 100 S.Ct. at p. 2142.) In addition, the Rent Board did not impose the 12 percent limit as a condition for granting a permit. (Dolan, supra, 512 U.S. at p. 385, 114 S.Ct. at pp. 2316- 2317; Nollan, supra, 483 U.S. at pp. 831, 841, 107 S.Ct. at pp. 3145-3146, 3150-3151.) Finally, the Rent Board has a "legitimate ... interest[ ]" in easing the burden on tenants of sudden, large rent increases, and the 12 percent limit "substantially advance[d]" that interest. (Agins v. Tiburon, supra, 447 U.S. at p. 260, 100 S.Ct. at p. 2141; see also Penn Central, supra, 438 U.S. at p. 127, 98 S.Ct. at pp. 2660- 2661; Keystone, supra, 480 U.S. at p. 488, 107 S.Ct. at pp. 1243- 1244.) Thus, the factors that have proved relevant in other takings cases do not indicate a taking in this case.

[23] But Kavanau emphasizes the Court of Appeal's finding in Kavanau I that application of the 12 percent limit deprived him of a fair return and thus violated his right to due process. We must, of course, accept that finding as true for purposes of this proceeding. Put simply, Kavanau argues that, because he lost rental income as a direct result of the Rent Board's unconstitutional application of its 12 percent limit, he has suffered a taking requiring just compensation. Thus, Kavanau asks us to consider whether a rent regulation that violates a particular property owner's right to due process by depriving him of a fair return also necessarily constitutes a taking.

As noted, the United States Supreme Court has declared that a regulation of property "effects a taking if [it] does not substantially advance legitimate state interests." (Agins v. Tiburon, supra, 447 U.S. at p. 260, 100 S.Ct. at p. 2141.) The similarity of this takings standard to the due process requirement that a regulation "have a reasonable relation to a proper legislative purpose" (Nebbia, supra, 291 U.S. at p. 537, 54 S.Ct. at p. 516) supports Kavanau's argument that a due process violation in this context constitutes a taking. In fact, when the high court first articulated this takings standard, it cited Nectow v. Cambridge (1928) 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842, a due process case. (Agins v. Tiburon, supra, 447 U.S. at p. 260, 100 S.Ct. at p. 2141.) Kavanau's argument might also find some support in cases such as Duquesne,

supra, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646, Florida Power, supra, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), and 20th Century, supra, 8 Cal.4th 216, 32 Cal.Rptr.2d 807, 878 P.2d 566, which apply standards under the takings clause similar to those that apply under the due process clause.

On the other hand, the Rent Board stresses the distinct functions of the due process clause and the takings clause. The Rent Board argues that the due process protection focuses on method. It requires that a regulation not be arbitrary or capricious and that the regulatory agency give due consideration to conflicting interests. The takings protection focuses on result. According to the Rent Board, a taking occurs only in cases of " 'deep financial hardship' " (20th Century, supra, 8 Cal.4th at p. 258, 32 Cal.Rptr.2d 807, 878 P.2d 566) or when a regulation deprives a property owner of nearly all use of the property (Lucas, supra, 505 U.S. at p. 1015, 112 S.Ct. at p. 2893). The Rent Board asserts we should no more treat a due process violation affecting property as a taking than we would treat an equal protection or free speech violation affecting property as a taking.

***686** [24][25] In this case, we need not decide whether a rent regulation that violates a particular property owner's right to due process also constitutes a taking, because, assuming it otherwise might, we hold that a remedy for the due process violation, if available and adequate, obviates a finding of a taking. In a variety of contexts, the Supreme Court has recognized that the benefits a property owner receives in conjunction with a regulation may offset the burdens and thus satisfy the takings clause. (Penn Central, supra, 438 U.S. at p. 137, 98 S.Ct. at pp. 2665- 2666; see generally Kendall & Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan (1995) 81 Va. L.Rev. 1801, 1837-1842; Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies (1975) 75 Colum. L.Rev. 1021, 1039-1042.) Thus, in Pa. Coal, Justice Holmes noted the "average reciprocity of advantage" that often characterizes regulations and justifies them for purposes of the takings clause. (Pa. Coal, supra, 260 U.S. at p. 415, 43 S. Ct. at p. 160.) More explicitly, the court has long held that the special benefits conferred on a property owner's remaining property as a direct result of a taking may constitute just compensation. (Bauman v. Ross (1897) 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270.)

Bauman involved the taking of private property to build a highway in the District of Columbia. The court stated: "The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and ... no such prohibition can be implied...." (Id. at p. 584, 17 S. Ct. at p. 980.) Similarly, a government agency may "mitigate ... [the] financial burdens" of a land-use regulation, and thus avoid a takings clause violation, by transferring development rights to the property owner's other parcels. (Penn Central, supra, 438 U.S. at p. 137, 98 SCt. at pp. 2665-2666; see also MacDonald, Sommer & Frates v. Yolo County, supra, 477 U.S. at p. 350, 106 S.Ct. at pp. 2566- 2567; cf. Suitum v. Tahoe Regional Planning Agency (1997) --- U.S. ----, 117 S.Ct. 1659, 137 L.Ed.2d 980 [not deciding whether the sale value of transferable development rights is relevant to the existence of a taking or only to the adequacy of the compensation].) Consistent with the reasoning of these cases, when a due process violation is the sole basis of an asserted taking, a remedy for the due process violation, if available and adequate, is a valuable benefit that satisfies the takings clause. (Cf. Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 194-197, 105 S.Ct. 3108, 3120-3122, 87 L.Ed.2d 126 [state law inverse condemnation remedy may be adequate compensation for purposes of takings clause]; Ruckelshaus v. Monsanto Co. (1984) 467 U.S. 986, 1019, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 [Tucker Act remedy may be adequate compensation for purposes of takings clause]; Regional Rail Reorganization Act Cases (1974) 419 U.S. 102, 136, 150, 155-156, 95 S.Ct. 335, 354-355, 362, 364-365, 42 L. Ed.2d 320 [same].)

Under the due process clause, future rent ceilings must enable Kavanau to earn a fair return that will "maintain financial integrity, attract necessary capital, and fairly compensate [him] for the risks [he has] assumed." (Permian Basin, supra, 390 U.S. at p. 792, 88 S.Ct. at p. 1373.) Among other things, this standard requires the Rent Board to consider, when setting rent ceilings, Kavanau's costs, which include certain costs associated with rent control. (Civ.Code, § 1947.15 [stating circumstances in which rent control agencies must consider the cost to a landlord of professional services associated with rent control].) We think one of the costs associated with rent control that the Rent Board must consider is the cost to Kavanau of

any confiscatory rent ceilings the Rent Board previously imposed on the apartments in question. (Cf. Communications Satellite Corp. v. F.C.C. (D.C.Cir.1977) 611 F.2d 883, 894 & fn. 19 [past deficiency "may not be capitalized into the rate base for future years" unless "rates ... have for some time been under strictures set by an administrative agency" and the deficiency is the result of agency "miscalculation"].) Thus, irrespective of whether section 1983 would have afforded Kavanau a remedy for the due process violation, his continuing right to an adjustment of future rents can provide an adequate remedy.

***687** An adjustment of future rents that takes into consideration past confiscatory rents is the converse of the refund that producers in price- regulated industries may have to pay if, during litigation over price levels, they charge prices that a court later determines to be excessive. (See, e.g., Trans Alaska Pipeline Rate Cases (1978) 436 U.S. 631, 655, 98 S. Ct. 2053, 2066-2067, 56 L. Ed.2d 591.) Moreover, this remedy, as opposed to an award of damages against the Rent Board, places the cost of compensating Kavanau roughly on those tenants who benefited from unconstitutionally low rents. (Cf. State of California v. Levi Strauss & Co. (1986) 41 Cal.3d 460, 472-473, 224 Cal.Rptr. 605, 715 P.2d 564 [antitrust class action applying "fluid recovery" whereby fund roughly benefits those who suffered damages]; Blue Chip Stamps v. Superior Court (1976) 18 Cal.3d 381, 388, fn. 1, 134 Cal.Rptr. 393, 556 P.2d 755 (conc. opn. of Tobriner, J.) [price reduction as remedy for overcharges].) We note in this regard that if any of Kavanau's tenants have vacated an apartment, then state law may have authorized Kavanau to set the rent for his new tenants at a level that enabled him, or will enable him, to recoup past losses. (Civ.Code, §§ 1954.50-1954.53.) In that case, he would not be entitled to an additional rent adjustment. Thus, in practice, future rent adjustments are likely to affect only those tenants who have not moved and who benefited from unconstitutionally low rents.

[26] Finally, the remedy of future rent adjustments avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages. (Cf. United States v. Western Pac. R. Co. (1956) 352 U.S. 59, 63-64, 77 S.Ct. 161, 164-165, 1 L.Ed.2d 126 [deferring to the "primary jurisdiction" of an administrative agency "whenever

enforcement of the claim requires the resolution of issues which ... have been placed within the special competence of an administrative body"].) Setting rent ceilings is essentially a legislative task, and agencies, not courts, choose which administrative formula to apply. (Fisher, supra, 37 Cal.3d at p. 681, 209 Cal.Rptr. 682, 693 P.2d 261.) The state and federal Constitutions require only a fair process that reasonably takes into consideration the landlord's interests, and a landlord's return need only fall within a "broad zone of reasonableness." (Permian Basin, supra, 390 U.S. at p. 770, 88 S.Ct. at pp. 1361- 1362). Accordingly, courts are in no position to determine the appropriate rent ceiling for an apartment as a means of assessing damages. We strongly resist any rule that would impose on a reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for $746 per month rather than $745.

[27] Here, the City's rent control scheme is sufficiently flexible to permit the Rent Board to consider past confiscatory rent ceilings when evaluating a landlord's petition for a rent increase. (Charter, § 1805(e).) Kavanau, of course, is not necessarily entitled to rent increases equal to the exact amount by which his past rents fell below some imagined constitutional minimum. Rather, he is merely entitled to future rent ceilings that will "maintain financial integrity, attract necessary capital, and fairly compensate [him] for the risks [he has] assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." (Permian Basin, supra, 390 U.S. at p. 792, 88 S.Ct. at p. 1373.) But, in measuring the future rent ceiling for a particular apartment, the Rent Board must take into consideration the effect on Kavanau, if any, of the temporary enforcement of its confiscatory regulation with respect to that apartment. In this regard, we note Kavanau's actual loss in this case may be small or nonexistent. For example, the Rent Board arguably could have satisfied the Kavanau I mandate by waiving the 12 percent limit, but imposing a higher limit, under some other regulatory provision, that adequately accommodated Kavanau's interest in a fair return. If, in response to Kavanau I, the Rent Board allowed Kavanau to increase rent in accordance with its maintenance of net operating income formula, but without any annual limit, it may already have enabled Kavanau to recoup his losses. In addition, the

12 percent limit was not confiscatory to the extent *688 market conditions would have prevented Kavanau from increasing rent more than 12 percent even if the Rent Board had not enforced the limit.

Kavanau asserts he would have to double his rents in order to recoup his losses within a reasonable period of time. He points out that he operates in a competitive environment, and he argues that future rent adjustments are an inadequate remedy because they will price his apartments above market levels and leave him with an empty building. If Kavanau's assertion is true, then those same market forces might well have prevented Kavanau from increasing his rents regardless of the 12 percent limit. The Constitution does not protect investors from the risks inherent in the marketplace. In addition, Kavanau does not persuade us that his losses, if any, are so great as to prevent him from recouping them through future rent adjustments. In fact, Kavanau conceded at oral argument that his rents remained well below free market levels even with the full increase he sought. Moreover, if a landlord acts promptly to challenge a confiscatory regulation, and seeks a stay of that regulation during litigation, his losses, and thus any future rent adjustments, are likely to be relatively small. A landlord who unnecessarily permits large losses to accumulate cannot complain if the market prevents him from recouping those losses. Finally, we do not here decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable. But before Kavanau can allege the unavailability of future rent adjustments, he must petition for those adjustments, the Rent Board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them.

[28] Just as a reviewing court averages the effects of subsidiary aspects of a price-setting scheme by looking at "net effect" (Duquesne, supra, 488 U.S. at p. 314, 109 S.Ct. at p. 619), a reviewing court can also average the effects of a price-setting scheme over time. Thus, a fair return over the course of several years will offset a confiscatory return during a particular year. Recognizing that Kavanau has a continuing right under the due process clause to future rent adjustments that will enable him to earn a fair return, we believe he has not suffered a taking. Put another way, the ongoing process of setting rent ceilings dispels the due process violation, which in this

case is the sole basis for a potential takings clause violation. (Cf. Mountain Water v. Mont. Dept. of Public Serv. Reg. (9th Cir.1990) 919 F.2d 593, 601 [no violation of Constitution because water utility "may seek just compensation for its property taken through [future] rate setting"].) Accordingly, we agree with the trial court and the Court of Appeal that Kavanau has not stated a viable inverse condemnation claim.

CONCLUSION

Kavanau I determined that application of the Rent Board's 12 percent limit on rent increases violated Kavanau's right to due process. The remedy of future rent adjustments available to Kavanau under the due process clause precludes a finding of a taking in this case. Accordingly, we affirm the judgment of the Court of Appeal.

GEORGE, C.J., and MOSK, KENNARD and WERDEGAR, JJ., concur.

MOSK, Justice, concurring.

I concur in the majority opinion. I write separately to attempt further clarification of the relationship between due process and takings jurisprudence in the context of rent control and rate regulation generally.

The term "due process" has at least two distinct meanings or applications in the field of rate regulation: (1) substantive due process, i.e., whether the scheme of regulation in question is " ' "arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt...." ' " (Pennell v. San Jose (1988) 485 U.S. 1, 11, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (Pennell)); (2) what can be termed "confiscatory" due process, i.e. whether a given scheme of rate regulation, although not per se or facially invalid, is confiscatory in its result and has prevented an opportunity to obtain a just and reasonable rate of return on investment. ***689** (See Duquesne Light Co. v. Barasch (1989) 488 U.S. 299, 307-308, 109 S.Ct. 609, 615-616, 102 L.Ed.2d 646 (Duquesne Light Co.)). As explained below, it is this latter confiscatory due process analysis that significantly overlaps the takings clause.

Substantive due process analysis of price and rate regulation is fairly straightforward. Price regulation is presumed to be

constitutional, and " 'The burden of proving' otherwise 'rests on the party asserting the violation....' [Citation.] It 'is not easily met. For the last half-century, courts have upheld challenged governmental acts unless no reasonably conceivable set of facts could establish a rational relationship between the regulation and the government's legitimate ends.' [Citation.] 'It is enough that there is an evil at hand for correction, and that it might be thought that the particular ... measure was a rational way to correct it.' " (20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 292, 32 Cal.Rptr.2d 807, 878 P.2d 566, italics added (20th Century Ins. Co.).)

Rent control is simply a form of price control. "For constitutional purposes rent control is indistinguishable from other types of governmental price regulation. Despite the permanence and concreteness of real property, and the special place accorded it by the common law and expounded by the early commentators, its commercial use is no less subject to regulation under the police power than other, more ephemeral, goods and services.... To ascertain the limitations imposed by the ... federal constitution[ ] upon municipal efforts to regulate rents, it is therefore appropriate to consider the constitutional limits on governmental regulation of prices generally." (Hutton Park Gardens v. Town Council of West Orange (1975) 68 N.J. 543, 350 A.2d 1, 7-8, fn. omitted.)

As the United States Supreme Court affirmed in Pennell, a rent control case: "[W]e have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare." (Pennell, supra, 485 U.S. at p. 13, 108 S. Ct. at p. 858.) Thus, that court upheld a facial challenge to a rent control ordinance that "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." (Ibid.) Accordingly, the notion advanced by some commentators (see Radford, Regulatory Takings Law in the 1990s: The Death of Rent Control? (1992) 21 Sw. U. L. Rev. 1019) that rent control laws are subject to a heightened constitutional scrutiny that goes beyond the substantive due process "rational relationship" analysis to which other economic regulation is subject, is without constitutional basis. Nor is it constitutionally sound to assert that a trial court, sitting as trier of fact, may act as a kind of "Super City Council" that can evaluate whether a rent control law has

been successful in achieving its stated purposes. (See ibid.) A trial court may not arrogate to itself such a role. Neither may an appellate court. "In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purpose, but instead look to whether ' "the governmental body could have had no legitimate reason for its decision." ' " (Kawaoka v. City of Arroyo Grande (9th Cir.1994) 17 F.3d 1227, 1234, italics in original.) Whether rent control is the best way to remedy the problem of excessive rents in a given locale, and whether the benefits it brings in terms of lower-than-market rents for some tenants outweighs its costs, is a matter to be addressed to legislative bodies. [FN1]

FN1. The notion that rent control laws may now be subject to a more exacting form of constitutional scrutiny is predicated on a reading of Nollan v. California Coastal Commission (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed.2d 677. (See Radford, supra, 21 Sw. U. L.Rev. at p. 1030.) We have rejected elsewhere the contention that Nollan and the related case of Dolan v. City of Tigard (1994) 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 represent a new standard of scrutiny of government regulation other than those regulations that require either a physical dedication of property, or a development fee levied on an "individual and discretionary basis." (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 876, 50 Cal.Rptr.2d 242, 911 P.2d 429.) In the present case, rent control neither requires a physical dedication nor amounts to an individual and discretionary development fee. Indeed, as explained above, it is not a land use regulation at all but a form of price control.

Moreover, the fact that the Pennell decision, which postdates Nollan, relies on traditional substantive due process analysis in determining whether a rent control law is within a city's police power (Pennell, supra, 485 U.S. at pp. 11-12, 108 S. Ct. at pp. 857-858), indicates that Nollan does nothing to undermine the fundamental constitutional validity of rent control laws. "[W]e have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " (Pennell, supra, 485 U.S. at p. 12, fn. 6, 108 S.Ct. at p. 856, fn. 6.) In short, nothing in recent Supreme Court case law indicates an intent to

> replace the traditionally deferential substantive due process standard with some heightened takings standard when reviewing the basic validity of a rent control law or other form of price regulation. And the mere fact that a plaintiff chooses to label his or her action as a suit for just compensation after a "taking," when it is in essence a substantive due process challenge to an economic regulation, is without constitutional significance.

***690** Although a government agency's capacity under the police power to regulate rents in some manner is seldom in doubt, the particular form the regulation takes will not pass constitutional scrutiny if it is confiscatory. This confiscatory analysis, although it also goes under the rubric of "due process," is substantially different than the substantive due process analysis discussed immediately above. The fixing of a " 'just and reasonable' rate [ ] involves a balancing of the investor and the consumer interests.... [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated." (Federal Power Commission v. Hope Natural Gas Company (1944) 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333 (Hope).) In determining a just and reasonable rate, "it is the result reached not the method employed which is controlling. [Citations.] It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." (Id. at p. 602, 64 S.Ct. at pp. 287-288.) Thus in Hope, for example, Justice Douglas discussed the utility's historical earnings and financial status in considerable detail and concluded that it was able to maintain its "financial integrity." (Hope, supra, 320 U.S. at pp. 604-605, 64 S.Ct. at pp. 288-289.) The court more recently did the same in Duquesne Light Co., supra, 488 U.S. at page 312, 109 S.Ct. at page 618.

Some rent control cases speak of confiscatory regulations without engaging in "end result" analysis. (See Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001.) In Birkenfeld, we found that Berkeley's rent control law, as then drafted, was partly unconstitutional because it failed to make adequate provision for adjusting base rents. (Id. at p. 169, 130 Cal. Rptr. 465, 550 P.2d 1001.) Although Birkenfeld used the language

of confiscation, it is in fact closer to substantive due process analysis. As we stated: "The provisions [of a rent control law] are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory." (Id. at p. 165, 130 Cal.Rptr. 465, 550 P.2d 1001.) Turning to Berkeley's rent control scheme, we concluded that "Here the [law] drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings." (Id. at p. 169, 130 Cal.Rptr. 465, 550 P.2d 1001.) Thus, this particular feature of Berkeley's scheme was deemed to be constitutionally invalid not because its end result was actually "confiscatory," in the sense in which Hope and its progeny employ that term, but because it was arbitrary and could not be rationally related to the legitimate state purpose of "eliminat[ing] excessive rents and at the same time provid[ing] landlords with a just and reasonable return on their property." (Birkenfeld, supra, 17 Cal.3d at p. 165, 130 Cal. Rptr. 465, 550 P.2d 1001.)

Similarly, regulation that set rates for insurers at less than a fair rate of return in order to compensate for supposedly excess profits was determined to be a violation of *691 due process in Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 819, 258 Cal.Rptr. 161, 771 P.2d 1247. "[T]he concept that rates may be set at less than a fair rate of return in order to compel the return of past surpluses is not one supported by precedent." (Ibid.) Again, this aspect of the law was declared unconstitutional because it failed to pursue a legitimate state purpose--an essentially substantive due process violation--not because it resulted in fact in the undermining of the financial integrity of the various insurance companies.

In Duquesne Light Co., supra, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646, the court appeared to use the terms "due process" and "taking" interchangeably in referring to utility rate regulation that is confiscatory and therefore constitutionally defective. As the court stated, "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. Covington and

Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205, 41 L.Ed. 560 (1896) (A rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,' and in so doing 'practically deprive[s] the owner of property without due process of law'); [citations]. If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." (Duquesne Light Co., supra, 488 U.S. at pp. 307-308, 109 S.Ct. at pp. 615-616, italics added.) However, it is clear that the Duquesne Light Co.'s equation of the two constitutional provisions was made only in reference to rate regulations that are confiscatory in their end result. (Duquesne Light Co., supra, 488 U.S. at p. 310, 109 S. Ct. at p. 610.) In other words, a rate regulation is judged to be a taking when its effect has been actually confiscatory, not when it violates substantive due process. As has been stated, "[A]bsent ... deep financial hardship [of a regulated public utility], there is no taking, and ... no obligation to compensate...." (Jersey Central Power and Light Co. v. FERC (1987) 810 F.2d 1168, 1181, fn. 3; accord, 20th Century Ins. Co., supra, 8 Cal.4th at p. 297, 32 Cal.Rptr.2d 807, 878 P.2d 566.)

The notion that a price regulation that leads to the actual confiscation of property is a "taking" of that property is congruent with the Supreme Court's evolving takings jurisprudence in the field of land use law, wherein the impact of land use regulation, either in economic terms or in terms of physical intrusion on real property, is paramount in any takings analysis. (See Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015-1016, 112 S.Ct. 2886, 2893-2894, 120 L.Ed.2d 798.) But nothing in the land use cases, or in Duquesne Light Co., suggests that any regulation that violates substantive due process is a taking for which just compensation must be paid. [FN2]

FN2. It is admittedly true that Supreme Court precedent is not entirely clear on where substantive due process ends and takings law begins. In the area of land use regulation, the court has held that a general zoning law is a taking of property if it "does not substantially advance legitimate state interests." (Agins v. City of Tiburon (1980) 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L. Ed.2d 106.) Whether and to what extent this standard differs from the ordinary substantive due process "rationally related" standard

is a question beyond the scope of this opinion. The "substantially advance" standard has not been applied by the Supreme Court outside the special area of forced dedications of property in exchange for development permits. (See Nollan v. California Coastal Commission, supra, 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed.2d 677; Dolan v. City of Tigard, supra, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304.) In any case, the Supreme Court has not indicated any intent to extend the "substantially advance" test beyond the realm of zoning and similar laws which restrict the use of land, and has not applied such a test to price regulations. (See fn. 1, ante).

In the present case, the basis of the Court of Appeal's holding in the original Kavanau decision (see Kavanau v. Santa Monica Rent Control Bd. (1993) 19 Cal. App.4th 730, 23 Cal.Rptr.2d 724 (Kavanau I)) is unclear. The opinion can be read as a substantive due process case, concluding that the 12 percent cap found in the Santa Monica ordinance is arbitrary. As the majority herein explain, however, there is no reason why a 12 percent cap cannot "be one aspect of a comprehensive scheme that as a whole provide[s] landlords *692 a fair return." (Maj. opn., ante, at page 683 of 66 Cal. Rptr.2d, at page ---- of --- P.2d.) It appears from the dollar figures alleged in Earl W. Kavanau's complaint and stated in the majority opinion (maj. opn., ante, at page 676 of 66 Cal.Rptr.2d, at page 855 of 941 P.2d), that Kavanau may have made a bad business decision purchasing the rental property in question, since the amount of debt service and operating expenses exceed rental income. These facts on their face do not indicate a constitutional violation. " 'A regulated firm has no constitutional right to a profit.' " (20th Century Ins. Co., supra, 8 Cal.4th at p. 294, 32 Cal. Rptr.2d 807, 878 P.2d 566, brackets omitted.) Although, as the majority point out, we are bound by the law of the case to the Court of Appeal's conclusion that a 12 percent cap was arbitrary, this conclusion does not signify that Kavanau was in fact subject to "deep financial hardship" as the result of the rent regulation. The judgment of the Kavanau I court does not translate into the claim that Kavanau deserves just compensation under the Fifth Amendment to the United States Constitution.

As the majority properly conclude, the cost of past confiscatory rent regulation is "one of the costs associated with rent control that the Rent Board must consider" in setting a present just and reasonable

rent. (Maj. opn., ante, at page 686 of 66 Cal.Rptr.2d, at page 865 of 941 P.2d.) If Kavanau can establish not only that the 12 percent cap was arbitrary, but that as the result of its imposition, he in fact suffered a sustained period of financial hardship that defeated any reasonable investment-backed expectation for the market in which he operated, then he may be entitled to a rate increase that compensates for such a confiscatory rate. But since, even if Kavanau I is taken at face value, it is far from clear that the result of the Santa Monica Rent Control Board's rate order was the actual imposition of an unfairly low rate of return, and since the post-Kavanau I remedy may have adequately compensated Kavanau for whatever supposed losses he suffered at the hands of the rent board, the majority is correct to conclude that Kavanau may not be entitled to any further rent readjustment. (See maj. opn., ante, at page 687 of 66 Cal. Rptr.2d, at page 866 of 941 P.2d.)

There is yet another reason why a landlord's claim for damages would be, at the very least, vitiated under a scheme of rent regulation. As I stated in my concurring opinion in 20th Century Ins. Co., supra, 8 Cal.4th at page 330, 32 Cal.Rptr.2d 807, 878 P.2d 566, it is evidently the case that " '[a] property owner must be legally compelled to engage in price-regulated activity for regulations to give rise to a taking. [Citations.] For example, public utilities generally are under a state statutory duty to serve the public, and must furnish "service on demand to all applicants" at government-determined rates. [Citations.] Because utilities are compelled to employ their property to provide services to the public, the Fifth Amendment requires regulators to provide utilities with reasonable compensation for their services. [Citations.] [¶] By contrast, where a service provider voluntarily participates in a price-regulated program or activity, there is no legal compulsion to provide service and thus there can be no taking.' " A "voluntary" participation in a price-regulated program is said to occur when an individual or company has the "right to withdraw therefrom." (Id. at p. 331, 32 Cal.Rptr.2d 807, 878 P.2d 566.)

Thus, one who persists in engaging in a regulated activity over an extended period of time, when withdrawal from that activity is an option, cannot lay at the doorstep of government regulation the reason for its economic failure. Government regulation may indeed place some firms in financial jeopardy, but that in itself does not give

rise to a constitutional violation when the government does not block the outflow of assets from these no-longer-profitable enterprises. Some features of the rate regulation may be a violation of substantive due process if they cannot be said to be part of a rational regulatory scheme, and these would therefore be subject to invalidation through injunctive and declaratory relief. But it does not follow that one who has a right to withdraw his capital from the regulated enterprise in question may press a damages claim against the government, either a just compensation claim for a taking or a statutory claim for damages under section 1983 of title 42 of the United States Code. It appears doubtful therefore that a landlord who is subject to lower-than-*693 reasonable rents, and has the option of withdrawing from the rental market, or recouping his previous losses prospectively through a compensatory rent order, can ever press such a claim.

BAXTER, Justice, dissenting.

I respectfully dissent from the majority's holding that a compensable taking cannot occur even though the government, acting through its rent control board, deprives a landlord of the opportunity to earn a fair and reasonable return on the landlord's property through unconstitutional and confiscatory application of its rent control regulations. I share Justice Croskey's view, expressed in his dissent below: "I can perceive of no reason in law or logic why a confiscatory rent control regulation, found to be unconstitutional on due process grounds, would not result in a compensable taking if it were nevertheless enforced and a monetary deprivation resulted. I can imagine no clearer example of a case where compensation should be paid than where the government has illegally taken or diverted to its own social goals the private property of one of its citizens. Indeed, such a common sense result and statement of principle should need no citation of authority."

In a decision now final (Kavanau v. Santa Monica Rent Control Bd. (1993) 19 Cal. App.4th 730, 23 Cal.Rptr.2d 724 (Kavanau I)), the Court of Appeal held that, as a result of the constitutionally impermissible action of defendant Santa Monica Rent Control Board, plaintiff was denied a fair and reasonable return on his rental property. As a result he allegedly suffered damages of $113,095 as of the date of his complaint. He sought to recover that amount plus

interest, attorney fees, costs, and other sums from the governmental body responsible for his loss, the Santa Monica Rent Control Board (the Board), in a complaint stating a cause of action in inverse condemnation. His complaint was dismissed. The Court of Appeal affirmed the trial court judgment and a majority of this court now affirms that judgment on the grounds that plaintiff's allegations, if true, do not establish a taking and, even if the Board's action denied him due process because it denied him a fair return on his property, he has another remedy--increased rents--by which means third parties may eventually reimburse him for what the Board allegedly took from him.

The majority err. There has been a taking of a substantial property right--plaintiff's right to seek a fair and reasonable return from his property. Plaintiff has both a federal and a state constitutional right to recover the loss he suffered as a result of that taking from the Board. By mandating rents so low that its action denied plaintiff due process of law, the Board took from him a significant stick in the bundle of sticks that together constitute ownership of real property (see Kaiser Aetna v. United States (1979) 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L.Ed.2d 332)--the opportunity to earn a reasonable return on his property. Since the rent ceiling imposed by the Board denied plaintiff the reasonable return his property would otherwise have earned, it necessarily denied plaintiff economically productive use of his rental property and to that extent took a right to which he was constitutionally entitled. Under both the Fifth and Fourteenth Amendments to the United States Constitution (Fifth Amendment) and article I, section 19 of the California Constitution (article I, section 19), plaintiff must be compensated for that taking by the governmental entity that took his property. It is not sufficient that he is permitted to raise the rent paid by his tenants from which increases he may eventually recoup his losses.

I

THE "TAKINGS" CLAUSE AND RENT CONTROL

The Fifth Amendment taking clause, incorporated into and made applicable to the states by the Fourteenth Amendment (Chicago, Burlington & Q.R. Co. v. Chicago (1897) 166 U.S. 226, 239, 17 S.Ct. 581, 585-586, 41 L.Ed. 979), provides, inter alia that "private property [shall not] be taken for public use without just

compensation." Article I, section 19 contains a similar command, providing inter alia: "Private property may be taken or damaged for public use only *694 when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." When the government fails to meet its constitutional obligation under these provisions, an action in inverse condemnation lies against the government to recover "just compensation." (Customer Co. v. City of Sacramento (1995) 10 Cal.4th 368, 377, fn. 4, 41 Cal.Rptr.2d 658, 895 P.2d 900.) And, even though the confiscatory rent ceiling imposed on plaintiff has been judicially invalidated, compensation must be paid for the income he lost while the impermissible rent ceiling was in effect, a period during which there was a "temporary taking." (First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 321, 107 S.Ct. 2378, 2387, 96 L. Ed.2d 250.)

The Board may not avoid either a finding that there has been a taking or the obligation to pay constitutionally mandated compensation on speculation that plaintiff's loss may be reduced at some time in the future by increased rent paid by tenants who benefited from the reduced rent or, if those tenants leave, by new tenants who pay market rate rent. The question of whether there has been a taking must be decided independently of the value for just compensation purposes of any future monetary recovery from third parties allowed the owner whose property has been taken. (Suitum v. Tahoe Regional Planning Agency (1997) --- U.S. ----, 117 S.Ct. 1659, 137 L. Ed. 2d 980.)

The majority assume, but are reluctant to decide, whether a rent regulation which, as applied, denies a property owner due process constitutes a taking within the meaning of the Fifth Amendment and article I, section 19. I do not share that reluctance and I disagree with the view that there has been no taking in this case. I would hold that, because the rent regulation was adjudicated in Kavanau I to be so arbitrary as to deny due process by preventing plaintiff from earning a fair and reasonable return on the property, a taking occurred for which just compensation must be paid by the Board.

The interests which enjoy constitutional protection as "property" are generally defined by state law. (Civ.Code, § 755; Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1030, 112 S.Ct. 2886, 2901, 120 L.Ed.2d 798.) In California "[t]he right to acquire

and possess property, guaranteed by the constitution, includes the right to dispose of it, or any part of it, and for that purpose to divide it in any possible manner, either by separating it into estates for successive periods or otherwise, and to dispose of one or more of such estates." (Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 575, 140 P. 242; Gregory v. City of San Juan Capistrano (1983) 142 Cal.App.3d 72, 88, 191 Cal.Rptr. 47.) Just as that right encompasses the power to grant a license to use a portion of the owner's property temporarily (see Ex Parte Quarg (1906) 149 Cal. 79, 84 P. 766 [theater ticket]), it includes the right to create a leasehold estate.

Because the Board has not appropriated or physically invaded plaintiff's property, his claim is that there was a "regulatory taking," a restriction on his use of the property that went "too far" (Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (Pennsylvania Coal)), during the period for which he seeks damages. There was a "temporary taking." The contrary conclusion implicit in the majority opinion is foreclosed by the final judgment of the Court of Appeal in Kavanau I, supra, 19 Cal. App.4th 730, 23 Cal.Rptr.2d 724. The majority err both factually and legally therefore when they hold that there has been no taking because application of the Santa Monica rent control ordinance has not denied plaintiff " 'all economically beneficial or productive use of' his property." (Maj. opn., ante, at p. 684 of 66 Cal.Rptr.2d, p. 863 of 941 P.2d.) The Board did deny plaintiff all economically beneficial use of his property.

The legal conclusion that a taking occurred during the time that plaintiff was denied a fair and reasonable return on his rental property cannot be avoided under the United States Supreme Court precedent on which the majority rely. As the majority recognize, a regulatory taking may occur in a variety of contexts. The Supreme Court has identified many, implicitly concluding in some that because the governmental restriction went "too far," the property owner had been unfairly called upon to sacrifice a property *695 interest for the benefit of the public in circumstances in which the burden should be shared by the public as a whole. While the contexts in which the court has found a regulatory taking or rejected a taking claim differ, a common thread runs through the analysis. Although phrased somewhat differently in the court's various decisions, the economic

impact of the regulation on the property owner has been a determinative factor. When the regulation denies the owner economically productive use of the owner's property for its customary use, the regulation goes too far. It is irrelevant in those circumstances that the regulation furthers or is necessary to accomplish a legitimate public purpose that is otherwise within the police power of the government. A taking occurs for which just compensation must be paid.

"[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle" a taking occurs. (Lucas v. South Carolina Coastal Council, supra, 505 U.S. at p. 1019, 112 S.Ct. at p. 2895, fn. omitted.) The same is true if a regulation deprives the owner of economic use to the extent that the owner is unfairly singled out to bear a burden that should be borne by the public as a whole. (Yee v. Escondido (1992) 503 U.S. 519, 522-523, 112 S. Ct. 1522, 1526, 118 L.Ed.2d 153.) [FN1] A taking also occurs if a land use regulation extinguishes a fundamental attribute of ownership. (Agins v. Tiburon (1980) 447 U.S. 255, 262, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106; Kaiser Aetna v. United States, supra, 444 U.S. at pp. 179-180, 100 S.Ct. at pp. 392-393.)

FN1. The court noted in Yee that it had never considered whether a mobilehome rent control ordinance like that of the City of Escondido effected a regulatory taking, but refrained from addressing that issue only because the question has not been properly raised. (503 U.S. at p. 538, 112 S.Ct. at p. 1534.) The court expressed no doubt that a rent control ordinance could effect a regulatory taking. (Ibid., see also Pennell v. San Jose (1988) 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1.)

The taking clause necessarily applies to rent control ordinances which affect the ability of a property owner to earn a fair return on property which is generally used for rental purposes since the regulations restrict both the owner's fundamental right to create leasehold estates and the owner's right to make economically productive use of the property. The Fifth Amendment taking clause "is addressed to every sort of interest the citizen may possess" including leasehold interests. (U.S. v. General Motors Corp. (1945) 323 U.S. 373, 378, 65 S.Ct. 357, 359-360, 89 L.Ed. 311.) That the

Fifth Amendment taking clause applies to restrictions imposed by rent control ordinances has been acknowledged by the United States Supreme Court since at least 1921. In Block v. Hirsh (1921) 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, the court upheld a rent control law applicable to the District of Columbia and made necessary by exigencies of the first World War. In so doing, the majority recognized that rent control regulations could be so restrictive as to amount to a taking. (Id. at p. 156, 41 S.Ct. at pp. 459-460.) In Bowles v. Willingham (1944) 321 U.S. 503, 518, 64 S.Ct. 641, 649, 88 L.Ed. 892, the court upheld a World War II price control act, some provisions of which applied to rental property, stating in reference to those provisions that "the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth."

The protection afforded by article I, section 19 is, of course, even broader than that of the Fifth Amendment. (Varjabedian v. City of Madera (1977) 20 Cal.3d 285, 298, 142 Cal. Rptr. 429, 572 P.2d 43.)

It is beyond dispute, therefore, that a rent control regulation that denies due process may also violate the taking clause of the Fifth Amendment, and article I, section 19. That being so, it is necessary to determine whether denying plaintiff the right to seek a fair return on his property did so. None of the decisions to which the majority look for identification of the factors relevant to determining whether a taking has occurred support the conclusion that no taking occurred here. It is clear to me that there has been a compensable taking.

In Pennsylvania Coal, supra, 260 U.S. 393, 43 S.Ct. 158, 67 L. Ed. 322, a seminal ***696** decision in the regulatory taking area, the Supreme Court considered the application of a Pennsylvania statute prohibiting anthracite coal mining in such a manner as to cause subsidence to a parcel of property. The property was subject to a deed executed by a coal company conveying the surface but expressly reserving the right to mine coal. The grantee of the surface interest expressly assumed all risk and waived all damage claims arising from the mining. The court held that application of the statute in these circumstances exceeded the police power of the state and constituted a compensable taking.

In reaching that conclusion the court recognized that property interests must yield "to some extent" to the police power, but this

implied limitation on the police power itself has limits imposed by the due process and contracts clauses of the Constitution. When exercise of the police power exceeds those limits, the government must exercise its power of eminent domain and pay just compensation. The "extent of the diminution" of the values incident to property determines when the limits of the police power have been exceeded. (Pennsylvania Coal, supra, 260 U.S. at p. 413, 43 S.Ct. at p. 159.) The coal company's reserved mining rights were recognized under Pennsylvania law, and therefore by the high court also, as a valuable estate in land. The extent of the taking was great, as application of the statute abolished that estate. (Id. at p. 414, 43 S.Ct. at pp. 159-160.)

In Pennsylvania Coal the court stated the general rule which continues to guide regulatory takings jurisprudence: "[W]hile property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.... [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Pennsylvania Coal, supra, 260 U.S. at pp. 415-416, 43 S. Ct. at p. 160.) [FN2]

FN2. The rule actually appears earlier in Block v. Hirsh, supra, 256 U.S. at page 56, 41 S. Ct. at pages 459-460, the decision in which the court held that rent control, including vacancy control, is not a per se taking. The law in question, applicable to Washington, D.C., property, provided procedures to assure the owner a reasonable rent. There, Justice Holmes explained that rent control is permissible when a public exigency makes that form of land use regulation necessary. Analogizing rent control to other permissible regulation of property he explained: "We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing.... All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the

present sort pressed to a certain height might amount to a taking without due process of law." (Ibid., italics added.)

Subsequent decisions applying and further explicating that general rule make it clear that the property interest at issue here is a valuable right and that the manner in which the Board applied its rent control ordinance to plaintiff went "too far."

In Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (Penn Central), application of a landmark preservation law to plaintiff's property precluded a proposed development of the airspace above an historic railroad terminal building. The law did award transferable development rights to owners of landmark properties that could not be further developed. The court recognized that the availability of those rights was relevant in determining the economic impact of the regulation when deciding whether application of the law effected a taking. (See also Suitum v. Tahoe Regional Planning Agency, supra, --- U.S. ----, 117 S.Ct. 1659, 137 L.Ed.2d 980.) The question before the court was whether denying the owner the right to build above the existing landmark structure constituted a taking. The court again recognized that whether a taking has occurred depends on the circumstances of the individual case, and requires what is essentially an ad hoc, factual inquiry. It identified as a factor to be considered the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." (*697 Penn Central, supra, 438 U.S. at p. 124, 98 S. Ct. at p. 2659.)

In applying its takings jurisprudence to Penn Central's property the court refused to consider the interest in airspace in isolation. It explained, "this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the 'landmark site.' " (Penn Central, supra, 438 U.S. at pp. 130-131, 98 S.Ct. at pp. 2662-2663.) After rejecting arguments that application of the landmark law to the property had diminished the value of the site and burdened Penn Central more than other property owners subject to it, noting that in these respects, the law was similar to a zoning ordinance, the court turned to the severity of the impact of the landmark law on the parcel as a whole. In concluding that the

impact was not such as to constitute a taking the court observed that the law did not interfere in any way with the existing use of the property, thus Penn Central's "primary expectation" about use of the parcel was unaffected. (Id. at p. 136, 98 S.Ct. at p. 2665.) It also noted that there had been no determination that all use of the airspace was prohibited since there had been no application for scaled-down development. Thus in this case, there had been no taking because "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." (Id. at p. 138, 98 S. Ct. at p. 2666, fn. omitted, italics added.) The court emphasized that this holding assumed Penn Central's "present ability to use the Terminal for its intended purposes and in a gainful fashion." (Id. at p. 138, fn. 36, 98 S.Ct. at p. 2666, fn. 36.)

The importance of the right to use one's property in an economically viable manner as the determinative factor in assessing whether a taking has occurred was again emphasized by the court in Agins v. Tiburon, supra, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106. There the validity of zoning ordinances which limited the number of homes that could be constructed on a five-acre parcel was challenged. Because the property owners had not sought a development permit, the only question before the court was whether enactment of the ordinances alone constituted a taking. In rejecting the property owners' taking claim, the court stated: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see Nectow v. Cambridge, 277 U.S. 183, 188 [48 S.Ct. 447, 448, 72 L.Ed. 842] (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 [98 S.Ct. 2646, 2666, n. 36, 57 L.Ed.2d 631] (1978)." (Id. at p. 260, 100 S.Ct. at p. 2141, italics added.) Neither occurred as a result of the adoption of the Tiburon zoning ordinances. While they limited development, "they neither prevent[ed] the best use of appellants' land [citation], nor extinguish[ed] a fundamental attribute of ownership [citation]." (Id. at p. 262, 100 S. Ct. at p. 2142.)

Here, of course, the holding in Kavanau I, supra, 19 Cal.App. 4th 730, 23 Cal.Rptr.2d 724, establishes that plaintiff was not permitted

"economically viable" or "reasonably beneficial" use of his property. Application of the rent control ordinance to the property seriously interfered with his, or any owner of rental property's, "primary expectation" about the use of rental property, since the Board did not permit him to earn a reasonable rate of return. Moreover, by denying plaintiff that right, the Board effectively extinguished a fundamental attribute of ownership of rental property.

While the determination of whether a taking has occurred often does require weighing of private and public interests (Agins v. Tiburon, supra, 447 U.S. at p. 261, 100 S.Ct. at p. 2142), outside the realm of measures necessary to protect life and property (see, e.g., Miller v. Schoene (1928) 276 U.S. 272, 48 S.Ct. 246, 72 L. Ed. 568), the balance has never been struck in favor of public interest when governmental action has denied an owner economically viable use of the owner's property.

***698** The importance of the impact of governmental action on the profitability of property in the weighing process appears in Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472. There a state law, which required that 50 percent of extractable coal be left in place under specified structures to protect them against subsidence, was applied to property owned by the petitioners. The high court rejected a facial challenge to the law and distinguished Pennsylvania Coal, supra, 260 U.S. 393, 43 S.Ct. 158, on the ground that the petitioners had not shown that their mining operations were not profitable under the restrictions imposed by the law. "The two factors that the Court considered relevant have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate states interest, ... or denies an owner economically viable use of his land.' Agins v. Tiburon, 447 U.S. 255, 260 [100 S.Ct. 2138, 2141, 65 L.Ed.2d 106] (1980) (citations omitted); see also Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 [98 S.Ct. 2646, 2659, 57 L.Ed.2d 631] (1978).... [T]he character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding ... that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has

been undue interference with their investment-backed expectations." (Id. at p. 485, 107 S.Ct. at p. 1242.)

Under any of the high court's formulations of the test or factors relevant in assessing whether a regulatory taking has occurred, there has been a compensable taking in this case. When application of a rent control ordinance to a parcel of property is so arbitrary and unreasonable as to be confiscatory and deny due process, by definition that application has denied the owner all economically beneficial use of the property. When a rent ceiling is constitutionally impermissible because it denies a property owner a fair and reasonable return on the property, the owner's investment-backed expectations have been extinguished as the state has made use of the property "commercially impracticable," an action which constitutes a taking. (See Pennsylvania Coal, supra, 260 U.S. at pp. 414-415, 43 S.Ct. at pp. 159-160.) [FN3] The character of the government action is placement of the burden of assuring affordable rental housing, a burden that should be borne by the public as a whole, unfairly on the individual property owner. The owner is denied a reasonable return on his investment in order to benefit tenants. And, because the opportunity to lease property for an amount that will generate a reasonable return on the owner's investment is a fundamental aspect of property ownership, application of a rent control ordinance in a manner which denies the owner that opportunity extinguishes that incident of ownership.

FN3. An apartment building, unlike undeveloped land, is not amenable to a variety of uses or any alternative economically feasible use.

There can be no dispute over the fact that rent control is a taking for public use or common good. Rent control is constitutionally permissible precisely because it is perceived as a means by which the adverse impact on the public of a housing shortage may be cured or mitigated. (Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 160, 130 Cal.Rptr. 465, 550 P.2d 1001.) "[A] primary purpose of rent control is the protection of tenants." (Pennell v. San Jose, supra, 485 U.S. at p. 13, 108 S.Ct. at p. 858.) It follows that when a rent ceiling is confiscatory the owner's right to use the property in an economically beneficial way "is being pressed into some form of public service under the guise of mitigating serious public harm."

(Lucas v. South Carolina Coastal Council, supra, 505 U.S. at p. 1018, 112 S.Ct. at p. 2895.)

Application of the additional factors identified by the majority (maj. opn., ante, at pp. 681-682 of 66 Cal.Rptr.2d, pp. 860-861 of 941 P.2d) as potentially relevant in determining whether a constitutional taking has occurred also leads ineluctably to the conclusion that there has been a taking in this case. The ***699** contrary reasoning of the majority is not supported by the authorities, discussed above, on which the majority rely. Those factors, in the order addressed by the majority, demonstrate the merit of plaintiff's claim:

1. The regulation of plaintiff's right to seek a reasonable return from his rental property does interfere with a property interest. Contrary to the majority view, the regulation did not simply delay the time at which plaintiff would receive the constitutionally adequate rents to which he was entitled. Application of the Santa Monica rent control ordinance by the Board has already denied plaintiff a fair return on his property. That temporary taking of this fundamental aspect of ownership allegedly cost plaintiff $113,095. Additionally, as his complaint alleges, the delay in receiving what would have been a fair return denied plaintiff the use of that money and interest of $30,956 that could have been earned.

Moreover, even assuming, as do the majority, that the government's obligation to pay just compensation may be shifted to third parties, there is no assurance that plaintiff will ever recoup his losses. It is true that he received some rental income, but that income was not a fair and reasonable return on the property. The complaint in inverse condemnation seeks to recover the rents that would have assured plaintiff a reasonable return, the amount taken from him by the Board's illegal application of the rent control ordinance.

2. The regulation did affect the existing use of plaintiff's rental property. It interfered to a constitutionally impermissible extent with his primary ownership expectation of receiving a reasonable return from rental property. Kavanau I, supra, 19 Cal.App.4th 730, 23 Cal.Rptr.2d 724, determined this.

3. It may be assumed that Santa Monica has a substantial interest in maintaining an adequate supply of affordable rental units, but that establishes only that the rent regulation is not invalid per se and that

plaintiff's property was taken for a public purpose. None of the authorities on which the majority rely suggest that this factor may ever outweigh the denial of an economically feasible use of property for its customary purpose in determining whether a taking has occurred.

4. The regulation did abrogate a substantial interest plaintiff holds in the property--the use of the property to produce a fair and reasonable return on plaintiff's investment. While he still owns the property, when rental property cannot be used to produce a fair and reasonable return, the only alternative to use of it for producing rental income is to sell it at a depressed price. Neither the Fifth Amendment nor article I, section 19 contemplates sale as an alternative economically feasible use. Both protect existing ownership interests.

5. The regulation has taken plaintiff's property to serve a public purpose.

6. It is given that the regulation did not permit plaintiff to earn a reasonable return.

7. Unlike Suitum v. Tahoe Regional Planning Agency, supra, --- U.S. ----, 117 S.Ct. 1659, 137 L.Ed.2d 980, and Penn Central, supra, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, which involved use restrictions, here the value of offsetting benefits such as the possibility that future increased rents permitted by the Board will offset some of plaintiff's losses is relevant only to whether just compensation has been paid. The existence of that possibility does not negate the fact that a taking has already occurred.

8. As applied in the past to plaintiff's property, the regulation did prevent the best and only economically feasible use of plaintiff's property, i.e., use to produce a reasonable income from rentals.

9. The regulation did extinguish a fundamental attribute of ownership--again the opportunity to rent or lease the property for rents that produce a fair and reasonable return during the period for which damages are sought. [FN4]

FN4. The tenth factor identified by the majority--permit-related requirements--is not involved here.

I agree therefore with Justice Mosk, who, in his dissenting opinion in Pennell v. City of *700 San Jose (1986) 42 Cal.3d 365, 376-377,

228 Cal.Rptr. 726, 721 P.2d 1111, expressed the view that a rent control ordinance which did not permit landlords with "hardship tenants" the same rental increases otherwise allowable, denied those owners a reasonable return on the property and thereby imposed on the owner what should be a public burden. The ordinance, he reasoned, created "forced subsidy imposed on the landlord in violation of the due process clauses of the United States and California Constitutions, which prohibit the taking of property without just compensation." (Id. at p. 377, 228 Cal.Rptr. 726, 721 P.2d 1111.)

II

THE RENTAL INCREASE ALTERNATIVE
TO AN INVERSE CONDEMNATION REMEDY

The majority apparently assume that plaintiff's rental units are and will continue to be occupied by some tenants who enjoyed the benefit of past impermissibly low rents. Therefore, the majority reason, we may justify compelling those tenants to pay rents which exceed the amount necessary to ensure plaintiff a reasonable return in order to reimburse plaintiff for what the government took. [FN5] Additionally, new tenants who pay market rate rents will help to reimburse him since those rents also exceed the amount necessary to ensure a reasonable return. Because plaintiff may recover his losses in this manner, there has been no taking and there is no need for an inverse condemnation remedy. Again, I disagree.

FN5. This assumption assumes in turn that rental increases sufficient to offset plaintiff's loss are permissible under Civil Code sections 1954.50 through 1954.53, the Costa-Hawkins Rental Housing Act which, while abrogating local limits on rent increases for vacant rental units, also contains a transitional limit for vacancies in rent controlled units of 15 percent more than the prior rental rate or 70 percent of the prevailing market rent. (Civ.Code, § 1954.53, subd. (c).)

The taking has already occurred. Plaintiff has already lost almost $150,000 because of the Board's action. Both the Fifth Amendment and article I, section 19 impose the obligation to pay just compensation on the governmental entity that takes an owner's property. Moreover, assuming either (1) that the availability of rent

increases might create a benefit adequate to permit a conclusion that there has been no taking, or (2) that the obligation to pay just compensation for a taking may be satisfied by shifting the burden to tenants through extraordinary rental increases, there is no assurance here that any present tenants on whom those increases fall will remain and pay the authorized increases. The majority's assumption that they will do so is unfounded. Also unfounded is the assumption that because plaintiff is allowed to raise the rent for vacant units, he will be able to recover his past losses from new tenants. The higher, presumably market rate, rents paid by new tenants are those which plaintiff would receive in any event since vacant units are no longer subject to rent control except to the extent that the preemptive state law imposes transitional limits. By no stretch of the legal imagination do these higher rents include a premium that will reimburse plaintiff for the past rental income which the Board wrongfully denied him. [FN6]

> FN6. It might be argued that because market rate rents in a tight rental market exceed a fair return on investment, the amount of that difference balances the losses suffered by an owner of rent regulated rental property when rents are set too low--i.e., the overall return meets the fair and reasonable return criterion. It does not follow, however, that receipt of market rate rental income to which the owner is entitled when a vacancy occurs, may be treated as compensation for past losses. Income which would be received in any case does not replace lost income.

Thus, the majority's holding that increasing the rents allowed for plaintiff's rental units is an adequate alternative to an action in inverse condemnation, rests entirely on speculation that plaintiff will someday recover the amount he allegedly lost from past tenants who will remain tenants even though the permitted rent increases will of necessity fix their rents at a figure above that otherwise permitted. It should be apparent to all that this illusory alternative remedy will not and cannot be considered an offsetting benefit that mitigates plaintiff's loss and relieves the Board of its obligation to pay for taking *701 plaintiff's property. The increased rents "remedy" neither precludes a finding that there has been a taking nor satisfies the constitutional command that just compensation be paid when a taking occurs.

The judgment dismissing plaintiff's cause of action for inverse condemnation should be set aside. For that reason, I would reverse the judgment of the Court of Appeal.

BROWN, J., concurs.

Filed 1/9/96

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EARL W. KAVANAU, Plaintiff and Appellant, v. SANTA MONICA RENT CONTROL BOARD, an Agency of the City of Santa Monica, Defendant and Respondent.	)	B087620 (Super. Ct. No. BC 103933)

APPEAL from an order of the Superior Court of Los Angeles County.

Ricardo A. Torres, Judge. Affirmed.

Earl W. Kavanau, in pro. per., for Plaintiff and Appellant.

Anthony A. Trendacosta and Ralph H. Goldsen, for Defendant and Respondent.

INTRODUCTION

A property owner may seek money damages for a partial taking in the period during which the owner challenges the validity of a regulation. The property owner, however, must show that the regulation constitutes a "taking" by depriving the owner of all viable economic use of the property. Although a rent control statute as applied to plaintiff invalidly subjected rent increases to a 12 percent annual cap, during the period plaintiff challenged that regulation he continued to receive rent and retained many other economic uses of

his property. No taking occurred, and we affirm the sustaining of a demurrer to his inverse condemnation action.

On May 2, 1994, Earl W. Kavanau ("plaintiff" or "Kavanau") filed a complaint against the Santa Monica Rent Control Board ("defendant" or "the Board") alleging causes of action for inverse condemnation and for deprivation of civil rights (42 U.S.C. § 1983). The trial court sustained the Board's demurrer without leave to amend as to both causes of action. An order of dismissal was filed September 8, 1994.

Kavanau filed a notice of appeal on September 29, 1994.

STANDARD OF REVIEW

In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. This court also considers matters that may be judicially noticed. When a demurrer is sustained, this court determines whether the complaint states facts sufficient to constitute a cause of action. When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

FACTS

The complaint contained the following allegations. Kavanau owns a 10-unit apartment building at 818 5th Street in Santa Monica, which is subject to the rent control law of the City of Santa Monica, which the Board administers.

Between November 1, 1988, and October 31, 1989, Kavanau collected $43,444 in rent and spent $160,499 operating, maintaining and improving the property. On November 30, 1989, Kavanau applied to the Board for rent increases on 9 of the 10 units pursuant to regulations governing rent-increase petitions and the Board's Maintenance of Net Operating Income ("MNOI") formula.

Although finding that Kavanau was entitled to immediate yearly rent increases of approximately $35,000, the hearing examiner allowed Kavanau to implement only $5,184 of that increase in the first year, with the balance of the $35,000 to be implemented over

eight years of annualized increases, each not to exceed a 12 percent cap.

Kavanau unsuccessfully appealed the hearing examiner's decision to the Board. The superior court denied his petition for a writ of administrative mandamus. Division One of this court reversed the superior court's ruling and held that the Board's regulation 4107 was unconstitutional as applied and directed the trial court to issue a writ of mandate commanding the Board to permit Kavanau to implement the remaining increases determined by the hearing examiner to be appropriate under the MNOI formula, without any reduction under Regulation 4107(a). (*Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal.App.4th 730, 736-737.)

As of the filing of the complaint, the Board's action caused Kavanau to lose rental income totaling $113,095: $34,729 (May 1990 to April 1991); $32,936 (May 1991 to April 1992); $26,410 (May 1992 to April 1993); and $19,020 (May 1993 to April 1994).

As a result of the Board's unlawful application of regulation 4107, Kavanau suffered a "taking" and "damaging" of his property rights pursuant to the California Constitution, article I, section 19, Code of Civil Procedure section 1036, and the United States Constitution. Kavanau lost monthly rental income beginning with the Board's May 1990 affirmance of the hearing examiner through the Board's April 14, 1994, compliance with the writ of mandate. The Board has deprived Kavanau of his federal and state constitutional rights to earn a fair return on his investment and of interest he could otherwise have earned, valued at approximately $30,956.

On appeal, Kavanau has abandoned his second cause of action for violation of civil rights.

ISSUES

Plaintiff claims on appeal that:

1. The failure to allow a landlord to earn a fair return is a "taking or damaging" pursuant to Califonia Constitution, article I, section 19; and that

2. He has suffered a state and a federal taking.

DISCUSSION

The complaint concerns the period between the Board's May 1990 affirmance of the hearing examiner's April 7, 1990, decision[1] and the Board's compliance with the writ of mandate on April 14, 1994. The complaint alleged damages beginning in April 1990 and ending in April 1994.

During this period, the hearing examiner found that under the MNOI formula, Kavanau was entitled to rent increases averaging approximately $323 per month per unit, or roughly $35,000 annually. The 12 percent cap limited those rent increases to $5,184. (*Kavanau, supra,* at pp. 733-734.)

Kavanau seeks recovery of rent increases retroactively from the Board, based on inverse condemnation.

a. *Inverse Condemnation*

The question in this appeal is whether a regulatory scheme which has been declared invalid, as applied to Kavanau, makes the Board liable to Kavanau for damages during the period the regulation was applied to his property.

Kavanau argues that the complaint states a cause of action based on article I, section 19 of the California constitution.[2] He argues that the Board should compensate him for the loss of $113,095 in rental income.

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[1] A date taken from *Kavanau v. Santa Monica Rent Control Bd., supra*, 19 Cal.App.4th at p. 734; the complaint alleges that the Board affirmed the hearing examiner's decision in May 1990.

[2] Article I, section 19 states: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the comdemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 321 held that a landowner may bring an inverse condemnation suit based on a temporary regulatory taking, but only if the landowner had been denied all use of his property during the temporary taking. The court stated: "where the government's activities have already worked a taking of *all use* of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (Emphasis added.) The case was remanded to the trial court to determine if the landowner had been denied *all* use of its land. On remand, *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1356 found, in part, that no taking occurred because the county ordinance in question advanced a preeminent state interest in public safety and did not deny the landowner all use of its property. The facts underlying the *First English* cases are important to their results.

The First English Evangelical Lutheran Church owned a parcel of flat land in a national forest sited next to Mill Creek, a drainage channel for an upstream watershed area owned by the National Forest Service. 3,860 acres of watershed burned in July 1977, creating a flood hazard. The following winter, a storm dropped 11 inches of water into the watershed, creating a wall of water and debris that swept away bridges and buildings, drowned 10 people, and caused millions of dollars in losses, including destruction of numerous buildings on the church's property. A county ordinance adopted after the flood prohibited reconstruction of buildings in the Mill Creek Canyon interim flood protection area, which included those flat areas of the church's property where its buildings formerly stood. (*Id.* at pp. 1356-1357; *First Lutheran Church v. Los Angeles County, supra,* 482 U.S. at p. 307.)

The trial court sustained a motion to strike that portion of plaintiff church's inverse condemnation action based on the taking of all use of church property by the county ordinance. The California Court of Appeal concluded that because the United States Supreme Court had not ruled on whether a state may limit the remedy for a taking to non-monetary relief, it was bound to follow *Agins v. Tiburon* (1979) 24 Cal.3d 266. *Agins* held that a property owner was not entitled to monetary damages until a court ruled a land use regulation was excessive and the government nevertheless chose to continue the

regulation in effect. (*First English Evangelical Lutheran Church v. County of Los Angeles, supra,* 210 Cal.App.3d at pp. 1358-1359.)

The United States Supreme Court, however, held that when an ordinance deprived a landowner of all use of its property for a considerable period, invalidating the ordinance without payment of fair value for the use of the property while the ordinance remained in effect would not be a constitutionally sufficient remedy. (*First Lutheran Church, supra,* at p. 322.) Even though it approved monetary damages for a "temporary regulatory taking," the United States Supreme Court remanded for a finding on whether such a taking had occurred.

On remand, the California Court of Appeal concluded that the case was not even close, and affirmed dismissal of the inverse condemnation action. (*Id.* at pp. 1361, 1374.) *First English Evangelical Lutheran Church v. County of Los Angeles* analyzed the issue as follows. The church operated the property as a camping facility. The ordinance prohibited reconstruction of structures demolished or damaged by floodwaters, and prohibited construction of new structures. But it did not prevent occupancy and use of structures that survived the flood; did not prohibit uses of the campground property which could be carried out without reconstructing old buildings or building new ones; and did not prohibit "uses of value to [the] purpose" of camping: "Meals could be cooked, games played, lessons given, tents pitched." *First English Evangelical Lutheran Church* concluded that the ordinance did not deny the church "all use" of its campground property, and this conclusion supported its holding that the complaint did not state a valid claim for a compensable taking. (*First English Evangelical Lutheran Church, supra,* 210 Cal.App.3d at pp. 1367, 1372.)

A taking occurs if, in applying a general regulation to particular property, the regulation "does not substantially advance legitimate state interests, [citation], or denies an owner economically viable use of his land, [citation]." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, __, [112 S. Ct. 2886, 2893].) Kavanau's eminent domain cause of action alleges the rent control statute deprived him of the economically viable use of his land for the period during which he litigated the rent control issue.

Kavanau v. Santa Monica Rent Control Board, supra, 19 Cal. App.4th 730, did not decide the eminent domain "taking" issue. Ruling instead on due process grounds, *Kavanau* held that the Santa Monica rent control statute was not *facially* invalid, but *as applied* to Kavanau it was unconstitutional because it did not meet the standard in *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 296: "The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community." *Cotati Alliance* is based on the due process standard of "just and reasonable return on [landlord's] property" in *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129.[3] (*Cotati Alliance for Better Housing, supra,* at p. 293.)

"[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at p. ____ [112 S. Ct. at p. 2895]; italics in original.) As many cases illustrate, however, no inverse condemnation cause of action exists where there has not been a total "taking" of the landowners' property.

In *Guinnane v. City and County of San Francisco* (1987) 197 Cal. App.3d 862, 868, the plaintiff retained his right to exclude others from his land and to sell the property. No taking arose from defendant City's delay in granting plaintiff's application for a permit to build four houses on adjoining lots pending environmental review.

Gherini v. California Coastal Com. (1988) 204 Cal.App.3d 699, 713-714, found no compensable taking occurred because of the

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[3] Rent control provisions come within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. (*Birkenfeld, supra,* 17 Cal.3d at p. 165.) The constitution does not mandate a fair return on the value of a landlord's property, only a fair return on investment. (*Apartment Assn. of Greater L.A. v. Santa Monica Rent Control Bd.* (1994) 24 Cal.App.4th 1730, 1737; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 102.)

Coastal Commission's refusal to certify a proposed county land use plan and recommendations for revisions which did not deprive landowners of all economic use of their property insofar as it permitted 21 dwelling units on the owner's 6,700-acre parcel.

Smith v. City and County of San Francisco (1990) 225 Cal.App.3d 38, 45-46, found no deprivation of substantially all value arising from City's requiring an environmental impact report and temporary designation of three lots as open space in the general plan; landowners obtained an option to sell land, including the three lots, for $810,000, indicating that the lots retained significant value. A dispute over lot description and set-back requirements on lots large enough for development does not constitute a deprivation of substantially all use of property.

Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal.App.3d 234, 242-244, found no inverse condemnation cause of action where landowners were not permitted to demolish a commercial building and build a larger, taller multipurpose office building, but were able to and did continue to use existing buildings on their property as they had for more than 40 years.

HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, 514 held that inverse condemnation does not lie in zoning actions in which the complaint alleges a mere reduction in market value.

In *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 912 the city enacted an ordinance restricting conversion of "residential hotels." The ordinance required owners of residential hotel units to obtain a permit before converting property to any other use and required property owners to build or rehabilitate an equal number of replacement units, or to contribute an "in lieu" fee, before a permit to convert property would be granted. *Terminal Plaza Corp.* found that the ordinance left the property owner with the right to sell or trade the property, to use the property in the same manner as before the ordinance, and to convert the property to other use upon compliance with the ordinance, and held that despite being restrictive and having the effect of reducing the value of the regulated properties, no taking occurred.

In *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 255-256, an ordinance allowed a one-family dwelling of an owner, employee or lessee on land zoned for agricultural use. This reclassified the land from commercial to agricultural use and thus diminished its value, but did not deprive the owners of all reasonable and beneficial use. *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 442-443, and *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328-329, are similar cases.

As stated in *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036, the denial of the highest and best use does not constitute an unconstitutional taking of property. Even where the government regulation diminishes the value of property very substantially, there is no taking. (*Ibid.*, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394: diminution in value from $800,000 to $60,000 not a taking; and *William C. Haas v. City & City. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120: diminution from $2 million to $100,000 not a taking.) *Long Beach Equities* also cited *MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541, 547 which found that a county's denial of a permit to harvest timber did not interfere with holding property for investment and with using the property for its original use, cattle grazing.

During the period in which he sought to invalidate its application to his property, Kavanau continued to receive rental income, even though it amounted to considerably less than the amount he would receive after *Kavanau* invalidated the 12 percent annual cap. Despite the application of the Santa Monica Rent Control law, moreover, numerous beneficial and substantial uses of the property remained. Kavanau could borrow against the property; refinance it; hold it for investment and appreciation; enjoy depreciation and other tax benefits; convert the property to condominiums (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1188-1189); cease to do business as a landlord (Gov. Code § 7060, et seq.; *Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524); or sell the property.

We conclude that no compensable taking occurred, that the complaint does not state a cause of action for inverse condemnation, and that the trial court correctly sustained the demurrer. Kavanau has

not specified that there is a reasonable possibility he can amend his complaint to cure its defects. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) We therefore affirm the order of dismissal.

DISPOSITION

The order of dismissal is affirmed. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KITCHING, J.

I concur:

KLEIN, P.J.

I respectfully dissent.

In the prior appeal (*Kavanau v. Santa Monica Rent Control Board* (1993) 19 Cal.App.4th 730), the court held that a portion of Santa Monica's rental control law (relating to the manner in which landlords could obtain a rent increase) was unconstitutional *as applied* to Kavanau. The reason for that conclusion was that the relevant regulations, as interpreted and applied by the Rent Control Board, did not permit Kavanau to receive a fair and reasonable return on his investment. A fair and reasonable return on investment standard is constitutional as applied only if the relevant regulation affords the administrative agency sufficient flexibility to avoid confiscatory results. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 682; *Calfarm Ins. Co. v. Deukemejian* (1989) 48 Cal.3d 805, 816.) The regulations, as applied to Kavanau's rent increase applications, were found by the appellate court to be unconstitutionally confiscatory and the trial court was ordered to enter judgment in his favor and to issue a writ of mandate directing

the Board to permit Kavanau to impose the rental increases found to be due.

In this action, we are bound by that determination. Thus, I would phrase the issue raised somewhat differently from my colleagues. The question presented by this case is whether the actions of the Board in depriving Kavanau of rental increases to which he was *constitutionally* entitled, during the period May 1990 through April 1994, constituted a compensable taking so as to enable him to maintain an action for inverse condemnation. This is no small matter. The impact on Kavanau was substantial. He alleges that $113,095 in rental income (plus over $30,000 in lost interest on such funds) was effectively transferred from him to his tenants by the Board's unconstitutional conduct. If he is not able to recover this sum from the defendant City, then from whom? If the theory of such recovery is not inverse condemnation, then what?[4]

The Fifth Amendment to the United States Constitution, made applicable to the several states through the Fourteenth Amendment (*Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226, 239), provides that "private property [shall not] be taken for public use, without just compensation." It is well settled that the purpose of this provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; see also *Agins v. Tiburon* (1980) 447 U.S. 255, 260-263; *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304, 318-319; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 835-836, fn. 4.)

Conceptually, there are three categories of potential takings: (1) outright physical taking (e.g., flooding, destruction or physical

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[4] "An action in inverse condemnation arises directly from the constitutional provision (art. I, § 19) and is independent of any right to sue under traditional tort theories. [Citations.] The right to sue in inverse condemnation is 'fundamentally rooted' in the Constitution, and the extent of a public entity's liability is fixed by the Constitution and not by rules of statutory or common law rights and responsibilities between private parties. [Citation.]" (*Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, 1635.)

occupation by government), (2) physical taking by regulation (e.g., regulatory measures authorizing permanent physical use of property by third parties), and (3) pure regulatory takings (i.e., regulations prohibiting or requiring certain uses of property by its owner). The first two categories require compensation (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426.) The third may or may not constitute a compensable taking depending on the facts and circumstances.

As Justice Holmes stated over 70 years ago, "[w]hile property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking" (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415; italics added.) Unfortunately, Justice Holmes did not define what was meant by the term "too far." As already noted, the Supreme Court in 1960, held that a governmental action will constitute a regulatory taking if it goes so far as to unfairly single out a property owner to bear a burden which society should bear as a whole. (*Armstrong v. United States, supra,* 364 U.S. at p. 49.) In 1978, in *Pennsylvania Central Transportation Company v. New York City* (1978) 438 U.S. 104, 125, the court identified five factors which must be considered when determining whether the regulation has gone so far as to require compensation: (1) the economic impact of the regulation on the owner, (2) the extent of the interference with the owner's reasonable investment-backed expectations, (3) the character and nature of the regulation, (4) the extent to which the owner benefits from the regulation, and (5) the nature and importance of the public interests which the regulation serves.

Unfortunately, the *Pennsylvania Central* court did not define the terms used in these general guidelines. However, this rather vaguely expressed concern with the nature and impact of regulation was refined and elevated to a two-part threshold inquiry in *Nollan v. California Coastal Commission, supra,* 483 U.S. 825. Borrowing language from *Agins v. Tiberon, supra,* 447 U.S. 255, the *Nollan* court held that land use regulations will require compensation under the Takings Clause if (1) they fail to "substantially advance legitimate state interests" *or* (2) they deny an owner an "economically

viable use." (*Nollan, supra*, 483 U.S. at p. 834.)[5] " '[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose.' " (*Id* at p. 834, quoting from *Pennsylvania Central, supra,* at p. 127.)

Our own Supreme Court recently summarized these rules in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1. " 'Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.' [Citation.] An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking. [Citation.]" (*Id.* at pp. 9-10.)

A rent control ordinance is a proper exercise of local government's police power if it is "reasonably calculated to eliminate excessive rents and at the same time provide landlords with a *just and reasonable return on their property*." (*Birkenfeld v. City of Berkeley*

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[5] In 1994, in *Dolan v. City of Tigard* (1994) _ U.S. _ [129 L. Ed.2d 304, 114 S.Ct. 2309], the Supreme Court reached a related issue left open by *Nollan*. In a case involving conditions imposed upon a commercial property owner seeking to double the size of her retail store and pave over her parking lot, the court held that to avoid the conclusion that the building permit conditions did not involve a "taking," the City had to demonstrate not only (1) that an *essential nexus* existed between the legitimate state interests involved and the permit conditions (a requirement imposed by *Nollan*), but also (2) that there was a *rough proportionality* between the exactions and the projected impact of the proposed development. (129 L. Ed.2d at p. 317.)

(1976) 17 Cal.3d 129, 165, italics in original.)[6] A rent control ordinance that failed to meet this standard would be unconstitutionally confiscatory; that is, it would deny due process. "[I]nherent in the *Birkenfeld* due process standard of 'a just and reasonable return on their property' is the assurance that an efficient landlord may recover all reasonable expenses actually incurred and, in addition, receive a fair profit or return on investment. [Citation.]" (*Cotati Alliance For Better Housing v. City of Cotati, supra,* 148 Cal. App.3d at p. 293.) The failure of a rental control ordinance to meet this standard "might well violate prohibitions against the taking of private property for public use without just compensation contained in the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution." (*Id.* at p. 293; see also, *Searle v. City of Berkeley Rent Stabilization Bd.* (1988) 197 Cal. App.3d 1251, 1259.)

Where, as here, the rent control ordinance is unconstitutionally applied so as to deprive the landlord of a "just and reasonable return" on his investment, then under *Birkenfeld,* it would *not* be a proper exercise of the police power. If such *improper* exercise of power results in a deprivation of the landlord's property (e.g., his right to receive certain rentals, a concededly significant aspect of the ownership rights to income producing rental property), then how can it be denied that a taking has occurred. Would not such a governmental invasion clearly satisfy Justice Holmes' test in *Pennsylvania Coal, supra,* of going "too far"? Would not such a circumstance

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[6] Another California court described the legitimate purpose of a rent control law in these terms: "We emphasize that the purpose of rent control is not to make the landlord a private guarantor of affordable housing for tenants, nor is it to bring about such a degree of decreased maintenance and services as to diminish the quality of housing available. The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community." (*Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 296.)

easily satisfy the general guidelines set out in *Pennsylvania Central*?[7] Finally, is there any way in which such an unconstitutional deprivation would not run afoul of both *Nollan* and *Dolan*? There is no legitimate state interest served by ignoring the due process rights of private citizens. To the contrary, any act of government which *unconstitutionally* interferes with the private property interests of its citizens must, perforce, result in a taking of property without just compensation to the extent that any uncompensated deprivation results.

In *Pennell v. San Jose* (1987) 485 U.S. 1, the Supreme Court did not reach the "takings" issue, although it was expressly raised and argued, because it was deemed "premature." However, Justice Scalia wrote in concurrence and dissent (joined by Justice O'Connor) that the addition by the City of San Jose of a "tenant hardship" factor in the regulatory processing of rental increase applications constituted a taking of the landlord's property without just compensation. (485 U.S. at pp. 19-24; conc. and disn. opn. of Scalia, J.) More significantly, in view of the majority's decision in this case that no taking could occur as a matter of law, both *Pennell, supra,* at pages 9-10 and *Yee v. Escondido* (1992) 503 U.S. _ [110 L.Ed.2d 153, 169] clearly recognized that a compensable taking could occur in the enforcement of a rent control regulation. Both cases had the issue presented but held that until a rent control regulation was unconstitutionally applied so as to deprive a landlord of a rental

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[7] In my view, each of the five factors set out in *Pennsylvania Central* would be implicated by government's unconstitutional imposition and enforcement of a confiscatory regulation. First, the economic impact on the landlord could range from serious to catastrophic, but it would always be significant because the government's actions were illegal. Second, for the same reason, the interference with the landlord's investment backed expectations would also be significant; imposition and continued enforcement of illegal regulations are never to be reasonably anticipated. Third, the character and nature of an illegal regulation which is nonetheless enforced will always be both odious and, by definition, unfairly burdensome. Fourth, the landlord obviously receives no benefit from the enforcement of an unconstitutional confiscatory regulation. Fifth, no public interest is ever served by government action in defiance of the Constitution.

which would have otherwise been permitted under a constitutional application of the regulation, then a taking claim was simply premature.

The relevant inference to be drawn from these cases, in the context of this case, is that, contrary to the views of the majority, a takings claim is indeed appropriate. The unconstitutional application, which was missing in both *Pennell* and *Yee*, is clearly present here. As we have already noted, that issue was finally resolved by the prior appellate decision.

The record in this case clearly shows that the defendant's unconstitutional acts resulted in the involuntary transfer of $113,095 of Kavanau's money to his tenants. The entire discussion by the majority, relying on a series of traditional land use regulation cases, is of little value to the precise issue presented here. Those cases simply deal with examples of governmental regulations which have not gone "too far," or, in the words of *Nollan*'s second prong, have not destroyed all economically viable usage of the property subject to the regulation. They have no relevance whatever to the facts of this case.

Moreover, the clear requirement of *Nollan* and *Dolan* that a regulation substantially advance the legitimate state interest sought to be achieved cannot be satisfied by showing that the State " 'could rationally have decided' the measure adopted might achieve the State's objective." (*Nollan v. California Coastal Commission, supra*, 483 U.S. at p. 834, fn. 3.) This is obviously stricter than the economic due process standard previously applied to non-physical takings. It has particular application to regulations controlling rents (none of the land use cases relied upon by the majority involve rent control). As one commentator concluded: "With the possible exception of a short-term response to a wartime emergency, the traditional objectives of rent control are highly vulnerable to attack under *Nollan*'s substantial advancement test. Responding to housing shortages or redistributing wealth may be regarded as legitimate state interests, but rent control generally fails to substantially advance these goals. Conversely, the political objectives that are furthered by rent control are of dubious legitimacy. . . . [¶] . . . The Supreme Court clearly demonstrated in *Nollan* that if a suspect regulation fails to substantially advance legitimate state interests, a taking will be

found regardless of the economic impact on the property owner. At the same time, however, the *Nollan* [c]ourt reiterated the second prong of its threshold inquiry under which a land use regulation violates the Takings Clause; namely, whether it denies the owner 'economically viable use' of property. Although it was not necessary to reach this test in *Nollan*, the [c]ourt has made it clear that deprivation of economically viable use by itself is sufficient evidence of a taking, regardless of the government interests served. [¶] This test, focusing on a challenged regulation's economic impact, is the lineal descendent of Justice Holmes' rule that if otherwise legitimate regulation 'goes too far' it will be recognized as a taking." (R.S. Radford, *Regulatory Takings Law in the 1990: The Death of Rent Control* (1992) 21 Sw. U. L.Rev. 1019, 1065; fns. omitted.)

With respect to the economically viable use test, upon which the majority entirely relies, and leaving aside for a moment the critical fact that the City's acts have already been determined to be unconstitutional, the application of that test will necessarily depend on how broadly the relevant property interest is defined. The more narrow the protected interest, the more easily a regulation may be found to deprive an owner of an economically viable use of that interest. The majority chooses to define Kavanau's property interest in the broadest possible terms. My colleagues emphasize that Kavanau still owned his apartment building, he could sell it, convert it to condominiums, borrow against it, receive (some) rental income from it and could continue to enjoy all of the related appreciation, depreciation and other tax benefits. I would argue, on the other hand, that it is more just and reasonable to define his property interest narrowly and limit it to the property actually taken from him; that is, the rentals which the defendant's own regulations entitled him to receive if they had been legally applied.

However, in my view, the most dispositive factor presented by this case is that we already have before us a final and binding judicial determination that the defendant's rent control regulations went "too far." As applied to Kavanau, those regulations have already been found to be confiscatory of his property (i.e., his right to receive a fair and reasonable return on his investment). I can perceive of no reason in law or logic why a confiscatory rent control regulation, found to be unconstitutional on due process grounds, would not result in a compensable taking if it were nevertheless enforced and a monetary

deprivation resulted. I can imagine no clearer example of a case where compensation should be paid than where the government has *illegally* taken or diverted to its own social goals the private property of one of its citizens. Indeed, such a common sense result and statement of principle should need no citation of authority.

I assume my colleagues would have no trouble perceiving a compensable "taking" of Kavanau's property had the City of Santa Monica seized $113,095 from his bank account in order to feed the City's homeless population. If that be so, why the difficulty here? The defendant's unconstitutional application of its own rent control regulations was no different and had the identical consequence. The government deprived Kavanau of his money to further its own social goals and has refused to compensate him. Such an unjust result cannot be defended on the ground that he has been left with the remaining portion of his property interests. If that is a justification for the defendant's illegal actions, then what was the purpose, consequence or meaning of the earlier determination that the defendant's regulations were unconstitutional as applied to Kavanau's rental property?

The demurrer to Kavanau's complaint should have been overruled. This is not a case which can be resolved against Kavanau on demurrer. I believe that he has alleged facts which demonstrate the existence of a claim for damages based upon the theory of inverse condemnation. I further believe those claimed damages arise from the defendant's wrongful taking of his property. Nor would it be proper to justify the majority's conclusions by reliance on the fact that Kavanau could have sought monetary relief in the prior action. While he was certainly free to join an inverse condemnation claim with his administrative mandamus action (*Hensler v. City of Glendale, supra,* 8 Cal.4th at p. 14), he was not required to do so. As we said in *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592: "Special procedural requirements apply where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency. In such cases, the proper procedure is to bring the inverse condemnation action in conjunction with, *or after,* a petition for administrative mandamus, as defined in section 1094.5 of the Code of Civil Procedure, the procedure generally required when the validity or propriety of an action or determination by an

administrative agency is challenged. [Citations.]" (*Id.*, at p. 607, italics added.)

It is indeed unfortunate that my colleagues are willing to sanction a result which is not only unjust, but also involves an undisputed injury to a private citizen flowing from an unlawful act of government. Hopefully, the Supreme Court will accept the opportunity presented by this case to address what appears to be an important and novel issue: Will a government's unconstitutional imposition and enforcement of a confiscatory rent control regulation give rise to a private property owner's right to assert an inverse condemnation claim for a resulting monetary deprivation?

CROSKEY, J.

ANTHONY A. TRENDACOSTA, CSB 67840
General Counsel
RALPH H. GOLDSEN, CSB 96842
Staff Attorney
SANTA MONICA RENT CONTROL BOARD
1685 Main Street, Room 202
Santa Monica, California 90401
(310) 458-8781

Attorneys for Defendant
Santa Monica Rent Control Board

Filed 9/8/94
Dept. 64

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EARL W. KAVANAU, Plaintiff, v. SANTA MONICA RENT CONTROL BOARD, an Agency of the City of Santa Monica, Defendant.	CASE NO. BC103933 ORDER OF DISMISSAL ~~[PROPOSED]~~

The demurrer of plaintiff Santa Monica Rent Control Board ("Board") came on regularly for hearing pursuant to noticed motion on August 11, 1994, in Department 64 of the above-entitled court. Earl W. Kavanau, plaintiff in propria persona, appeared on his own behalf. Ralph H. Goldsen, staff attorney, appeared on behalf of the Board. The court read and considered the complaint, the demurrer, plaintiff's opposition to the demurrer, and defendant's reply to the demurrer, and heard oral argument. The court thereupon sustained defandant's demurrer without leave to amend as to both causes of action. Good cause appearing therefrom,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice. Costs are not awarded in this proceeding.

DATED: Sep 08 1994.

By: /s/ Ricardo A. Torres
Hon. Ricardo A. Torres, Judge

Filed
Los Angeles Superior Court
Aug 12 1994
Edward M. Kritzman, Clerk

By P. Offord, Deputy

ANTHONY A. TRENDACOSTA, CSB 67840
General Counsel
RALPH GOLDSEN, CSB 96842
Staff Attorney
SANTA MONICA RENT CONTROL BOARD
1685 Main Street, Room 202
Santa Monica, California 90401
(310) 458-8781

Attorneys for Defendant
Santa Monica Rent Control Board

IN THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EARL W. KAVANAU, Plaintiff, v. SANTA MONICA RENT CONTROL BOARD, an Agency of the City of Santa Monica, Defendant.	)	CASE NO. BC103933 **NOTICE OF RULING ON DEFENDANT'S DEMURRER TO COMPLAINT**

TO: EARL W. KAVANAU, plaintiff in propria persona:

PLEASE TAKE NOTICE that on August 11, 1994, in Department 64 of the Los Angeles County Superior Court, the Hon. Ricardo Torres, Judge Presiding, the demurrer of plaintiff Santa Monica Rent

Control Board ("Board") came on regularly for hearing pursuant to noticed motion. Earl W. Kavanau, plaintiff in propria persona, appeared on his own behalf. Ralph H. Goldsen, staff attorney, appeared on behalf of the Board. The court read and considered the complaint, the demurrer, plaintiff's opposition to the demurrer, and defendant's reply to the demurrer, and heard oral argument.

The court thereupon sustained defendant's demurrer without leave to amend as to the first cause of action for inverse condemnation on the first ground stated in the demurrer, namely that plaintiff had failed to allege and could not allege a deprivation of all economic use of his property, as required for a temporary taking claim under *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2318.

The court sustained defendant's demurrer without leave to amend as to the second cause of action for violation of civil rights on the sixth ground stated in the demurrer, namely that such action accrued in 1990 and became barred by the statute of limitations in 1991, a year later.

The court directed defendant to give notice of its ruling. Defendant Board will prepare a proposed order of dismissal and submit it to the court after the passage of 10 days.

DATED: August 12, 1994

ANTHONY A.TRENDACOSTA
General Counsel

By: /S/ RALPH H. GOLDSEN
RALPH H. GOLDSEN
Staff Attorney

Attorneys for Defendant
SANTA MONICA RENT
CONTROL BOARD

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23 Cal.Rptr.2d 724, 19 Cal.App.4th 730, Kavanau v. Santa Monica Rent Control Bd., (Cal.App. 2 Dist. 1993)

*724 19 Cal.App.4th 730

Earl W. KAVANAU,

Plaintiff and Appellant,

v.

SANTA MONICA RENT CONTROL BOARD,

Defendant and Respondent.

No. B073052.

Court of Appeal, Second District, Division 1.

Oct. 21, 1993.
Rehearing Denied Nov. 9, 1993.
Review Denied Feb. 3, 1994.

[19 Cal.App.4th 731] Earl W. Kavanau, in pro. per.

Trevor Grimm, Los Angeles, and Craig Mordoh, Santa Monica, as amici curiae, on behalf of Apartment Ass'n of Los Angeles County, Inc.

Gilbert H. Friedman, Los Angeles, Anthony A. Trendacosta, Gen. Counsel, Ralph H. Goldsen, Staff Atty., for defendant and respondent.

*725 [19 Cal.App.4th 732] MIRIAM A. VOGEL, Associate Justice.

The issue in this case is whether the City of Santa Monica Rent Control Board's absolute limitation on annual rental increases is constitutional as applied.

Our answer is that it is not.

FACTS

A.

In 1979, the City of Santa Monica adopted a rent control charter amendment and created an elected Rent Control Board "empowered to regulate rentals ... so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." Pursuant to the charter amendment, the Board adopted Regulations 4100 through 4111, a "maintenance of net operating income" (MNOI) formula to determine whether a landlord is receiving a fair return and, if not, the basis on which rents can be increased. (FN1) The MNOI, in turn, is limited by Regulation 4107.

Under Regulation 4107(a), regardless of the amount of rent needed to satisfy the MNOI formula, and notwithstanding any other provision of the regulations, "[n]o upward rent adjustment may be authorized for any 12 month period in an amount in excess of twelve percent (12%) or twice the Employment Cost Index (ECI), whichever is greater." (We refer to this as a 12 percent cap.) If the amount of any adjustment otherwise authorized by the MNOI formula exceeds 12 percent, "the full justified amount shall be granted over a period of years such that the rent does not increase by greater than the said limit in any given year." Simply put, under Regulation 4107(a), rents can never be increased more than 12 percent (or twice the ECI) in any year, notwithstanding the amount of entitlement under the MNOI.

B.

In 1988, Earl W. Kavanau purchased a 10-unit apartment building in Santa Monica which was badly in need of repair. Between November 1, [19 Cal.App.4th 733] 1988, and October 31, 1989, Kavanau spent $98,099 on the building ($33,565 on operating expenses such as taxes, utilities and maintenance, plus $64,534 on capital improvements). (FN2) For the same period, his annualized debt service (which is excluded from the MNOI calculation) was $44,000. (Regulation 4101(c)(2)(ii) [mortgage principal and interest payments shall not be considered as an operating expense]; compare Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal.App.3d 280, 294, 195 Cal.Rptr. 825 [to be fair and reasonable, the allowed amount of rent should permit the property to

generate income sufficient to cover the costs of operation and the servicing of reasonable financing and should ensure the return of a reasonable profit].) His annualized rental income for that period was $43,444. (FN3)

*726 In November 1989, Kavanau applied to the Board for permission to raise rents, seeking an average increase of about $474 per month for nine of the ten units. In April 1990, the Board's hearing examiner determined that Kavanau was entitled, under the MNOI, to permanent increases of $183 per month per unit, plus an additional $140 per month per unit for the duration of the useful life of the capital improvements, a total of $323 per month per unit, starting immediately. (These figures are approximate, as they vary from unit to unit and, for the sake of simplicity, we use the rough figure of $35,000 to refer to the increased rent Kavanau would receive for the year in question if he had the benefit of the hearing examiner's findings under the MNOI.) To state the obvious, the hearing examiner's findings necessarily included the determination that, without the allowed increase, Kavanau was not making a fair return on his investment.

By applying the 12 percent cap, however, the hearing examiner reduced Kavanau's first year rent increase from $35,000 to $5,184, with the balance of the $35,000 to be implemented over eight years of annualized increases, each not to exceed the 12 percent cap. (FN4) Although Kavanau offered evidence to show why, in his view, the 12 percent cap ought not to be applied to him, [19 Cal.App.4th 734] the hearing examiner ruled all such evidence irrelevant and inadmissible. On April 7, 1990, the hearing examiner issued his decision, with findings that Kavanau was entitled to a $35,000 increase under the MNOI formula. Kavanau's rental increases were nevertheless limited by the 12 percent cap, to a total of $5,184.

Kavanau appealed to the Board, without success, and he then petitioned the trial court for a writ of administrative mandate to overturn the Board's decision. While the matter was pending in the trial court, the Board added a new subdivision (f) to Regulation 4107, to authorize a waiver of the 12 percent cap "in extraordinary circumstances." Later, Kavanau's petition was denied and he appeals from the judgment thereafter entered. (FN5)

DISCUSSION

Kavanau contends Regulation 4107(a) is facially unconstitutional or, alternatively, unconstitutional as applied to his situation. For the following reasons, we agree that the regulation is unconstitutional as applied.

A.

First, we summarily reject the Board's rather disingenuous assertion that the constitutionality of Regulation 4107(a) was determined in Baker v. City of Santa Monica, supra, 181 Cal.App.3d at p. 988, 226 Cal.Rptr. 755. Baker holds only that net operating income standards (such as Santa Monica's) have been approved by our courts. Regulation 4107 is not discussed (it is not even mentioned).

B.

[1][2] Second, we recite the basic requirements of a valid rent control scheme: *727 Although no particular formula is required, the rules adopted must be reasonably calculated to eliminate excessive rents while at the same time providing "landlords with a just and reasonable return on their property." [19 Cal.App.4th 735] (Birkenfeld v. City of Berkeley, supra, 17 Cal.3d at p. 165, 130 Cal. Rptr. 465, 550 P.2d 1001; Fisher v. City of Berkeley, supra, 37 Cal.3d at pp. 680-681, 209 Cal.Rptr. 682, 693 P.2d 261.) The formula cannot be confiscatory (Calfarm Ins. Co. v. Deukmejian, supra, 48 Cal.3d at pp. 816-821, 258 Cal.Rptr. 161, 771 P.2d 1247) and it cannot impose an absolute limit on rental increases (id. at p. 817, 258 Cal. Rptr. 161, 771 P.2d 1247; City of Miami Beach v. Forte Towers, Inc. (Fla.1974) 305 So.2d 764; Cromwell Assocs. v. Newark, supra, 511 A.2d at p. 1275 [any absolute limit, "even a generous 25%," is arbitrary in that it may not insure a fair return in all circumstances].)

C.

[3][4] Third, we turn to Regulation 4107(f) (the Board's new authority to waive the 12 percent cap "in extraordinary circumstances") which, on its face, would appear to save the 12 percent cap from Kavanau's constitutional attack. Obviously, the 12 percent cap would not be an "absolute" limit if it could be waived

when required to permit a landlord a fair, just and reasonable return on his investment.

But that is not what the Board has in mind. At oral argument, we asked counsel for the Board to identify the type of circumstance which might be considered "extraordinary" within the meaning of Regulation 4107(f). Quite frankly, the answer we got was not the one we expected--as the Board intends to apply Regulation 4107(f), a landlord whose building is substantially destroyed by an earthquake and who has difficulty obtaining financing to rebuild it would "probably" be eligible for relief from the 12 percent cap. But a landlord in the position of Earl Kavanau would not. In short, to the City of Santa Monica's Rent Control Board, "extraordinary" means insolvency or an act of God is threatened or has actually arrived and it does not include the mere loss of a fair and reasonable return. (Cf. Calfarm Ins. Co. v. Deukmejian, supra, 48 Cal.3d at p. 818, 258 Cal. Rptr. 161, 771 P.2d 1247.) (FN6)

D.

With the addition of subdivision (f)'s "extraordinary circumstances" waiver of the 12 percent cap, Regulation 4107(a) is not unconstitutional on [19 Cal.App.4th 736] its face. (Fisher v. City of Berkeley, supra, 37 Cal.3d at p. 679, 209 Cal.Rptr. 682, 693 P.2d 261 [a regulation will be declared invalid on its face only when its terms do not permit those who administer it to avoid confiscatory results in its application].) But with the Board's interpretation of subdivision (f), section 4107(a) is unconstitutional as applied in this case. (Id. at p. 682, 209 Cal.Rptr. 682, 693 P.2d 261 [a fair return on investment standard is constitutional as applied only if the regulation affords the Board sufficient flexibility to avoid confiscatory results]; Calfarm Ins. Co. v. Deukmejian, supra, 48 Cal.3d at p. 816, 258 Cal. Rptr. 161, 771 P.2d 1247 [we focus less on the rate specified in the regulation than on the ability of the person affected to obtain relief if that rate proves confiscatory].) (FN7)

E.

As was said in Cotati Alliance for Better Housing v. City of Cotati, supra, *728. 148 Cal.App.3d at p. 296, 195 Cal.Rptr. 825, "the purpose of rent control is not to make the landlord a private guarantor of affordable housing for tenants, nor is it to bring about

such a degree of decreased maintenance and services as to diminish the quality of housing available. The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community." As applied, the City of Santa Monica's 12 percent cap does not meet these goals. Accordingly, we hold that Kavanau is entitled to the result which follows from the validly applied MNOI formula, without the 12 percent cap. (FN8)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter a new judgment in favor of Kavanau and to issue a writ of mandate commanding the Board to permit Kavanau to implement the balance remaining of the increases determined by the hearing examiner to be [19 Cal.App. 4th 737] appropriate under the MNOI, without any reduction under Regulation 4107(a). If questions arise concerning implementation of this opinion, they shall be resolved by the trial court following appropriate hearings. Kavanau is awarded his costs of appeal.

SPENCER, P.J., and MASTERSON, J., concur.

FN1. Under the MNOI formula (which is a return on investment standard), the landlord's 1978 earnings are presumptively a "fair return" and the regulation is designed to maintain this fair return in subsequent years by allowing rents to be raised based on increased operating expenses and inflation. (See Baker v. City of Santa Monica (1986) 181 Cal.App.3d 972, 976, fn. 4, 226 Cal.Rptr. 755; see also Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 679-680, 209 Cal. Rptr. 682, 693 P.2d 261.) Rent control agencies are not constitutionally obliged to fix rents by any particular method but they are required to administer the selected formula in a manner which avoids confiscatory results. (Fisher v. City of Berkeley, supra, 37 Cal.3d at pp. 680-681, 209 Cal.Rptr. 682, 693 P.2d 261; see also Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 816, 258 Cal. Rptr. 161, 771 P.2d 1247 [the state and federal constitutions are concerned not so much with the way in which rates are set as with the result reached in the application of those rates].)

FN2. Kavanau actually spent an additional $18,400 on capital improvements during the same period but the Board's hearing examiner determined those expenditures were "unnecessary" to maintain the property and could not be used to calculate the allowable rent increase. This finding is not contested.

FN3. We are not asked on this appeal to decide whether the MNOI properly excludes from consideration a landlord's debt service. We note, however, that we can't accept the Board's overly broad assertion that this expense is properly excluded "because payments towards debt service build equity and therefore benefit the owner." "Debt service" includes interest, not just principal and, at a minimum, debt service is a factor which appears relevant to the determination whether, in fact, a landlord is receiving a fair return.

FN4. What this means is that Kavanau was denied the current use of the money the hearing examiner determined he was entitled to receive, and that he has permanently lost whatever interest or other income he could have earned with that money. It also means that any other increases which would automatically be justified over the next eight years (see, e.g., Regulation 1805(b) [which grants an automatic general adjustment pursuant to a specified formula] will be disallowed or at least indefinitely delayed because Kavanau will have already reached the 12 percent cap. (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 169, 130 Cal.Rptr. 465, 550 P.2d 1001 ["'Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them' "]; Cromwell Assocs. v. Newark (1985) 211 N.J.Super. 462, 511 A.2d 1273, 1276 [where there is no provision to factor in an increase lost because of a cap on rental increases, the cap "would cause a snowball effect of losses that might not be recouped"].)

FN5. As will appear, our review of Regulation 4107 is based on the current version, including subdivision (f). (Cf. Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 306, fn. 6, 138 Cal. Rptr. 53, 562 P.2d 1302.)

FN6. The Board's interpretation of Regulation 4107(f) makes it unnecessary for us to determine whether any evidence Kavanau might have presented on his appeal to the Board could or should reasonably have been considered in deciding whether to waive the

12 percent cap. His building was not damaged by an earthquake. He just wanted to show that he would not be receiving a fair return on his investment if the amount the Board determined to be a fair return was reduced as required by the 12 percent cap. (See Fox v. San Francisco Residential Rent etc. Bd. (1985) 169 Cal.App.3d 651, 657, 215 Cal. Rptr. 565 [approving a cap on yearly increases because the regulation at issue permitted exceptions for "extraordinary circumstances" and empowered the hearing officer to consider all "relevant factors" in determining whether a rent increase in excess of the cap was justified].)

*728 FN7. It is not and could not be disputed that Kavanau could not obtain a fair return under the Board's approach. To the contrary, his deficit for the year in question would be $111,871--$98,099 of allowed operating expenses and capital improvements, plus $18,400 of expenses Kavanau incurred but the Board determined were "unnecessary," plus $44,000 in debt service, less $43,444 in existing rents, less the allowed increase of $5,184, equals $111,871. (See Cotati Alliance for Better Housing v. City of Cotati, supra, 148 Cal. App.3d at p. 293, 195 Cal.Rptr. 825 [inherent in the due process standard of "a just and reasonable return" is the assurance that an efficient landlord may recover all reasonable expenses actually incurred and, in addition, receive a fair profit or return on investment].) And while it is true that a deficit, standing alone, is not determinative of whether a landlord is earning a just and reasonable return, a deficit of this magnitude does not leave a lot of room for debate.

FN8. We do not express a view about what might happen if, in future cases, the Board broadens its interpretation of "extraordinary circumstances" under Regulation 4107(f).

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DEC 19 1997
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No. 97-852

In The

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,

Petitioner,

vs.

SANTA MONICA RENT CONTROL BOARD, AN AGENCY OF THE CITY OF SANTA MONICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY A. TRENDACOSTA
DORIS GANGA
SANTA MONICA RENT CONTROL BOARD
1685 Main Street
Santa Monica, CA 90401
(310) 458-8781

* DAVID RICHARD PETTIT
* *Counsel of Record*
HEDGES & CALDWELL
606 S. Olive Street, Suite 500
Los Angeles, CA 90014
(213) 629-9040

KARL MICHAEL MANHEIM
LOYOLA LAW SCHOOL
919 S. Albany Street
Los Angeles, CA 90016
(213) 736-1106

Attorneys for Respondent Santa Monica Rent Control Board

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

1. Whether a party in a ratemaking proceeding who brought a combined due process and takings case in State court, and who lost the takings issue and won the due process issue, can thereafter maintain an action for inverse condemnation based solely on the due process violation.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Respondent Santa Monica Rent Control Board respectfully submits that the published opinion of the Supreme Court of California contains an accurate description of the proceedings below. Pet. App. at A-2 – A-6.[1] Petitioner's statement of the case is misleading and inaccurate in a number of respects.

The California Supreme Court determined in this case that 12% rent increases for each of eight successive years were not so low as to constitute a taking of Petitioner's property. *Id.* at A-1 – A-2. It also held that a due process violation had been cured by Respondent and, because of its insignificant economic impact, did not result in a taking.

Petitioner does not challenge the holding of the California Supreme Court that no taking occurred under this Court's existing standards. Instead, he asserts a new theory: that a due process violation necessarily is also a violation of the Takings Clause. Thus, under Petitioner's theory, errors in a rate order, even if cured upon routine review, constitute a temporary taking.

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[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. ___." The Appendix to this Brief in Opposition to the Petition for Certiorari is cited as "App. ___."

Petitioner purchased apartment buildings in Santa Monica, California, in 1988, nine years after the city adopted rent control. Shortly after purchase, Petitioner sought substantial rent increases from Respondent and challenged an existing regulation that limited rent increases to 12% per year.[2] His first challenge was rejected by the California Court of Appeal, which ruled that the regulation was constitutional.[3]

In a separate case involving the instant property, Petitioner again challenged the 12% limitation. He alleged in his complaint that Respondent's application of the limitation "constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions." App. at 4. The trial court denied relief on both claims. On appeal, the Court of Appeal reversed on the due process claim. Pet. App. at E-1 ("*Kavanau I*"). The sole remedy awarded by the Court of Appeal was mandamus ordering a rent increase. *Id.* at E-6. Although Petitioner also sought lost interim rents, App. at 4, ¶ 1.(1), that remedy was not awarded. The California Supreme Court denied review, and certiorari was not sought in this Court.[4]

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[2] Former Santa Monica Rent Control Board Regulation 4107(a) (amended 1994).

[3] The California Supreme Court denied review of the case and ordered that the decision not be published in the official reports. *See Kavanau v. Santa Monica*, 233 Cal.App.3d 1060 (1991).

[4] The regulation challenged in *Kavanau I* has been amended. Pet. App. at A-6. There is no longer an automatic limit on rent increases. Should a tenant request a rent increase limit

Subsequently, Petitioner filed the present case ("*Kavanau II*") for inverse condemnation and damages. He alleged that *Kavanau I* had established a temporary taking for which he was entitled to further relief. His claims were based on the Takings Clause, on 42 U.S.C. § 1983, and on Article I, Section 19 of the California Constitution. Only the first claim survives in this Court.[5]

All three courts below in this case held that just compensation was not available because Petitioner had not suffered a taking. Pet. App. at A-15, B-9, D-2. The California Supreme Court specifically concluded that the court in *Kavanau I* did not find a taking. Pet. App. at A-15, A-25.[6] And for that reason, Petitioner failed to state a claim for inverse condemnation in this case. Whether damages were independently available for the due process violation was not a question before the California Supreme Court, for Petitioner had abandoned his § 1983 claim. *Id.* at A-17.

Petitioner now alleges that the prior adjudication (in *Kavanau I*) of a due process violation conclusively demonstrated that a taking had occurred. Thus, according to Petitioner, he is entitled to just compensation irrespective

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based on his or her economic situation, the Board must consider the economic effect on the landlord of limiting an otherwise permissible rent increase. In addition, California law has changed so as to allow additional rent increases in all California cities beginning January 1, 1999. *Id.* at A-22.

[5] Petitioner abandoned his § 1983 claim, Pet. App. at A-3, A-17, and his state claim is not reviewable on certiorari.

[6] Petitioner is barred from rearguing that *Kavanau I* found a taking; the California Supreme Court's conclusion that it did not is binding. *See Tibbs v. Florida*, 457 U.S. 31, 46-47 (1982).

of whether the traditional standards under the Takings Clause are satisfied.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari misstates the issue before this Court. It is not whether just compensation is available in California courts for temporary takings of property. Indeed, the California Supreme Court's opinion reaffirms that such damages are available. Rather, the issue is whether just compensation is required even when no taking occurs. The California Supreme Court determined that Petitioner's property did not suffer a taking under any applicable test. It held that no categorical taking occurred, *i.e.*, that Petitioner had not been deprived of "all economically beneficial or productive use of land." Pet. App. A-10 – A-11 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). The court also held that no other formulation used by this Court established a taking. Pet. App. at A-11 – A-13, A-15 – A-19. Petitioner does not challenge those rulings here.

Instead, Petitioner claims that a Fifth Amendment taking occurred because he had been denied due process under the Fourteenth Amendment. According to Petitioner, a "taking of property" necessarily occurs

whenever a rate-setting agency violates due process.[7] As such, any substantive or procedural due process violation affecting property triggers the Fifth Amendment's self-executing remedy of just compensation. It was the California Supreme Court's refusal to adopt this unification of the takings and due process clauses, *id.* at A-20, that Petitioner assigns as error requiring review by this Court.

Petitioner also claims a conflict between the decision below and Ninth Circuit cases preferring the Takings Clause over due process in land use cases. No such conflict exists. Any infirmity in the use of the due process clause for review of the underlying rate order, rather than the Takings Clause, is a problem of Petitioner's own making. He prevailed in *Kavanau I* under a due process theory, and, having allowed that case to become final, cannot now be heard to complain that it should have been treated as a takings case. *Kavanau I* is *res judicata* and not subject to review or correction in this case.

The courts below found that no taking had occurred, either temporary or permanent. Accordingly, Petitioner's claim that California courts deny compensation for temporary takings is not properly before this Court. Nor is Petitioner's second issue – whether the Takings Clause protects property acquired with knowledge of regulatory limitations. That issue too is manufactured. There is nothing in the decision below to suggest that Petitioner's

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[7] As put by the court below, "Kavanau asks us to consider whether a rent regulation that violates a particular property owner's right to due process by depriving him of a fair return also necessarily constitutes a taking." Pet. App. at A-19.

property is not fully protected by the Fifth and Fourteenth Amendments.

A. Whether a Taking Can Be Proven Merely By Showing a Due Process Violation Is Not a Question Requiring Resolution In This Case

The only question arguably presented in this case is whether a taking can occur solely by virtue of a due process violation in a rate order. The California Supreme Court held that even if the general premise were accepted – that a due process violation could also constitute a taking – a taking did not occur in this case. The court reached that conclusion by applying standard takings doctrine, focusing on the character and economic impact of the challenged regulation. Pet. App. at A-11. The court found that any infirmity in the rate order was insubstantial, and far short of a taking. *Id.* at A-15 – A-16.[8]

The court declined Petitioner's invitation to merge the due process and takings clauses. It noted that the clauses are distinct and protect economic interests in different ways. *Id.* at A-6. In doing so, the court carefully followed this Court's decisions. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835, n.3 (1987) ("there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation

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[8] The court also had "serious doubts" that a due process violation had in fact occurred, suggesting that the Court of Appeal in *Kavanau I* had misapplied this Court's recent cases concerning review of rate orders. Pet. App. at A-15 – A-16.

of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical"); *see also Yee v. City of Escondido*, 503 U.S. 519, 532-37 (1992) (distinguishing between takings and due process claims); *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (same).

In order to establish a taking, and thus entitlement to just compensation, a property owner must show either an invasion of his land, *Yee*, 503 U.S. at 527, or that a regulation fails to "substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. None of these factors were found in either *Kavanau I* or this case. Nor does Petitioner now claim that they were or could be established based on these facts.[9]

Rather, the court in *Kavanau I* found a due process violation because the 12% annual limit in former Regulation 4107 precluded Respondent from duly considering Petitioner's interests. Pet. App. at E-5 – E-6. The purpose of the limitation was to protect renters from excessive rent increases; a purpose approved by this Court in *Pennell*, 485 U.S. at 10-11. Yet, due process requires that the agency also consider landlord interests in setting rents, *id.* at 13-14, which could not be done with an absolute ceiling on rent increases.

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[9] It bears repeating that Petitioner has apparently misread the decision of the California Supreme Court. He asserts that the court held damages were unavailable for a temporary regulatory taking. Pet. at 11. Instead, the court held that no temporary taking had occurred, and for that reason "just compensation" could not be awarded. Pet. App. at A-14 – A-15.

However, it is a far stretch to transmute this due process violation into a taking. Even in rate cases invoking both the due process and takings clauses, this Court has been careful to specify the requirements for a taking. It is the economic "impact of the rate order which counts." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). Yet, that issue is conspicuously absent from the petition, and for good reason. The decisions below finding an insignificant economic impact on Petitioner are unassailable.

This is not to suggest that a due process violation can never be a violation of the Takings Clause as well. Yet, the clauses are neither equivalent nor fungible. Because the constitutional standards and the constitutional remedies are different, Petitioner must separately prove his entitlement to just compensation. Infirmities in rate setting, in and of themselves, do not cause a taking. *Duquesne Light Co.*, 488 U.S. at 310.

That is especially true here, where any deficiency in rents, even if it violated due process, was remedied long before it could mature into a taking. Pet. App. at A-20. In response to *Kavanau I*, Respondent granted Petitioner an immediate 80% rent increase, even though all due process required was that the agency set aside its earlier decision and re-hear Petitioner's case without regard to the 12% annual limit. *Id.* at A-23, E-6. In addition, Petitioner was, and remains, entitled to further administrative relief in

the event he suffers operating losses, including those from alleged delay in the prior rent increase.[10]

It is this last point that Petitioner emphasizes and confuses in his petition. He claims that the California Supreme Court has established a new rule – that damages are no longer available for a taking; instead, "just compensation" is limited to future rent increases. Pet. at 11. But the court nowhere said that. It did not flout *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and hold that damages are unrecoverable for a taking. Rather, the court held that no taking had occurred. Pet. App. at A-20 (rent increases already received, and others Petitioner may obtain, "obviate[ ] a finding of a taking").

The California Supreme Court simply applied the standard rule that temporary operating losses, even those caused by regulatory delay, are not a taking unless they cause economic hardship. *Id.* at A-20 – A-21. Those losses must be so significant in magnitude and duration as to deny a business the ability to "operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk." *Duquesne Light Co.*, 488 U.S. at 310 (quoting *Hope*, 320 U.S. at 605). Petitioner did not even attempt to show a taking by these standards. Thus, he was not entitled to any recovery for "inverse condemnation." The California Supreme Court got the analysis precisely right.

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[10] To the extent Petitioner claims that future administrative relief will be inadequate, his case is not ripe for review at this time. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

This Court has never adopted Petitioner's argument – that due process is but a subset of the Takings Clause. To do so would mean that in the rate regulation context a regulated business never has to satisfy the test of *Duquesne Light Co.* that rates must be so low as to "jeopardize the financial integrity of the compan[y] . . . [or] inadequate to compensate" for risk. 488 U.S. at 312. Instead, all it need establish is some procedural infirmity in the rate-setting process, and it is automatically entitled to "just compensation." Not only does this theory neatly dispense with the need for congressional damage remedies (for example, 42 U.S.C. § 1983), it also directly undermines this Court's efforts to distinguish takings and due process claims, particularly in the context of rent control. *See Yee*, 505 U.S. at 532-37; *Pennell*, 485 U.S. at 8-14.

B. There Is No Conflict Between the Decision Below and Decisions of The Ninth Circuit

Petitioner struggles to manufacture a conflict between the decision below and Ninth Circuit cases. He argues that the decision below denies state court plaintiffs protection under the Takings Clause as long as a due process remedy exists, while the Ninth Circuit, favoring the more explicit Takings Clause, "will not entertain a due process claim." Pet. at 6. Thus, Petitioner posits a "deadly contradiction" where choice of forum in California dictates the constitutional cause of action that must be alleged for regulatory takings. *Id.*

Petitioner's flawed premise is that the California Supreme Court has prevented plaintiffs from litigating

claims under the Takings Clause and obtaining just compensation. Indeed, the decision below notes that California law provides two different opportunities to allege a taking: concurrent with, or subsequent to, review of the rate order. Pet. App. at A-17. Petitioner elected the former, but did not prevail. The court below merely held that, under the facts of this case, none of the well-established tests for a Fifth Amendment taking were met, and that a due process violation does not by itself constitute a taking. That determination is unexceptional, and erects no barriers to just compensation.

Petitioner implies that meritorious regulatory takings challenges are at risk in California courts because they can be "recharacterized as a due process violation." Pet. at 12. Yet this case provides no basis for such an assertion, for no "recharacterization" occurred here. In *Kavanau I*, Petitioner brought both a takings and due process claim, but succeeded solely on due process grounds. It is Petitioner who seeks to recharacterize that result in order to obtain a takings remedy. In rejecting this novel theory, the decision below did not vitiate or alter the right to just compensation for plaintiffs who satisfy applicable takings standards. Petitioner's apparent frustration that his due process violation was cured by a procedural remedy rather than through monetary compensation is misdirected given that he waived his § 1983 claim, the appropriate vehicle for any monetary award.

Petitioner's citation to Ninth Circuit case law also misses the mark. It is true that the Ninth Circuit has held that the "explicit textual source of constitutional protection," like the Takings Clause, "preempts a more generalized substantive due process claim" brought under the

Fourteenth Amendment. *Armendariz v. Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996) (citation and internal quotation marks omitted). However, none of the three Ninth Circuit cases cited by Petitioner (nor any other) held or even suggested that a due process remedy is not available in ratemaking cases. *See Armendariz*, 75 F.3d at 1325-26 (holding that constitutional protection against takings for private use grounded solely in the Takings Clause); *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996) (same), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1845 (1997); *Macri v. King County*, 110 F.3d 1496, 1500 (9th Cir. 1997) (holding that constitutional protection against land use restrictions that do not "substantially advance legitimate state interests" grounded solely in Taking Clause). Thus, the alleged conflict is illusory.

C. The Decision Below Does Not Deny Fifth Amendment Protection to Owners Who Acquire Regulated Property

The last question presented by the petition is whether a property owner "forfeits his Fifth Amendment rights" to just compensation if his property is taken by a law enacted prior to purchase. Pet. at 19. This is a contrived question having no relation to this case.

Petitioner cites to a single sentence in the decision below for his claim that the California Supreme Court has "extinguish[ed] the Fifth Amendment rights of citizens who purchase regulated property." *Id.* The court held nothing remotely like that. Rather, the court merely held that prior knowledge was one factor in assessing the impact on his "investment-backed expectations." Pet.

App. at A-18. That holding is fully in accord with those of this Court. *See Lucas*, 505 U.S. at 1003; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Takings Clause protects against "interfer[ence] with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The extent of those expectations is determined by "existing rules or understandings that stem from an independent source such as state law." *Lucas*, 505 U.S. at 1028. Thus, it is relevant to any analysis of economic impact on Petitioner's interests that the law he challenges had been in place for nearly a decade when he acquired the property. This is all the California Supreme Court said, and all it needed to say because the law's impact on Petitioner, however measured, was "not significant." Pet. App. at A-18.

The court below could have gone further and held, as this Court suggested in *Lucas*, 505 U.S. at 1030, that the pre-existing use restrictions on Petitioner's property inhered in his title "under relevant property" law; therefore, he could not resort to the Takings Clause when Respondent enforced those restrictions. *Id.* at 1031.[11] But, contrary to Petitioner's assertion, the California Supreme Court did not dismiss his takings claim on this ground. It merely stated that he could not claim frustration of expectations when, in fact, he expected a 12% annual

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[11] To the extent Petitioner complains of the enactment of the restrictions in the first place (nine years before he purchased), his claim is barred by the statute of limitations. *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 587 (9th Cir. 1991).

limit on rent increases. As noted in *Lucas*, application of "existing rules or understandings is surely unexceptional." *Id.*

CONCLUSION

The decision below applies well-settled doctrine under the Takings Clause. It is perfectly consistent with decisions of this Court and other courts. It does not raise recurring issues of national dimension. Accordingly, Petitioner has manifestly failed to demonstrate that certiorari is warranted. SUP. CT. R. 10.1.

For the foregoing reasons, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

*DAVID RICHARD PETTIT
**Counsel of Record*
HEDGES & CALDWELL
606 S. Olive Street, Suite 500
Los Angeles, California 90014
(213) 629-9040

ANTHONY A. TRENDACOSTA
DORIS GANGA
SANTA MONICA RENT CONTROL BOARD
1685 Main Street
Santa Monica, California 90401
(310) 458-8781

KARL MICHAEL MANHEIM
LOYOLA LAW SCHOOL
919 S. Albany Street
Los Angeles, CA 90016
(213) 736-1106

APPENDIX

CRAIG MORDOH
Attorney at Law State Bar #82425
Suite 301
2444 Wilshire Boulevard
Santa Monica, California 90403
(213) 453-6774

Attorney for Petitioner Earl Kavanau

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
WEST DISTRICT

EARL KAVANAU, Petitioner, v. SANTA MONICA RENT CONTROL BOARD, an Agency of the City of Santa Monica, Respondent.	CASE NO. SS 000 440 FIRST AMENDED PETITION FOR WRIT OF ADMINISTRATIVE MANDATE [CCP SECTION 1094.5] (Filed Dec. 12, 1990)
VIRDELMA GIVAN, SANDRA JEAN MAJD, RUSSELL KIZIOR, PHILIP HIMBERG, JIM BALLANTINE, PEGGY COGGESHALL, LAURIE MONLOUP, THEODORE KIRSCHNER, ROBERT VENEGAS, AMY SHERWOOD, AND ROBERT SHERWOOD, Real Parties in Interest.	

Petitioner Earl W. Kavanau (hereinafter referred to as "Petitioner") petitions this court for a Writ of Administrative Mandate under California Code of Civil Procedure Section 1094.5 directed to Respondent Santa Monica Rent Control Board, an agency of the City of Santa Monica (hereinafter referred to as "Respondent Agency"), and by this verified petition represents that:

1. Petitioner is now, and at all times relevant herein, has been the owner of the real property known by street address as 818 5th Street, Santa Monica, Los Angeles County, California (hereinafter referred to as "Property"). Property consists of ten residential rental units and is subject to the restrictions of Article XVIII of the Charter of the City of Santa Monica, commonly referred to as the Rent Control Charter Amendment.

2. Respondent Agency is now, and at all times relevant herein, has been the agency charged with administering the provisions of the Rent Control Charter Amendment.

3. Real Parties in Interest are now, and at all times relevant herein, have been tenants residing at the property.

4. On or about November 30, 1989, Petitioner filed with the Respondent Agency a petition for an individual rent adjustment, Petition Number I-1093, seeking increases in the maximum allowable rents for the rental units located on the Property.

5. On December 21, 1989, January 6, 1990 and January 27, 1990 the Respondent Agency's Hearing Examiner held evidentiary hearings to determine whether the Petitioner was entitled to rent increases. Petitioner presented

evidence, both oral and written, of repair and maintenance, of bids and estimates for work to be done in the future, and of expenditures of time and money spent by Petitioner at and on the property.

6. On or about April 17, 1990 the hearing examiner issued a written decision which granted Petitioner increases based on the application of the MNOI formula and proposed and completed capital improvements. The Petitioner was denied increases for other proven expenditures; the Petitioner's increases were capped at twelve percent per year despite the fact that the MNOI formula determined that Petitioner was entitled to an increase higher than 12% in order to achieve a fair return; and Petitioner was denied the ability to take advantage of the annual general adjustments for a period of seven (7) years.

7. On or about April 26, 1990 the Petitioner timely appealed the decision of the Hearing Examiner on the grounds that the decision of the Hearing Examiner was not supported by the evidence, was an abuse of the Hearing Examiner's discretion, and denied the Petitioner a fair return.

8. On May 24, 1990 the Respondent Agency considered Petitioner's appeal and despite minor revisions to the decision the Respondent Agency voted to uphold the decision of the Hearing Examiner.

9. Petitioner has now exhausted all of the administrative remedies available to him.

10. In making its decision the Respondent Agency exceeded its jurisdiction, failed to proceed in the manner

required by law, acted arbitrarily and capriciously and abused its discretion in the following respects:

a. The Respondent Agency's decision to prevent Petitioner from realizing the full rental increase which he is entitled to under the Respondent Agency's MNOI formula, denies Petitioner a just and reasonable return, constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions.

b. The Respondent Agency's order that Petitioner not partake of the annual general adjustment for a period of 7 years, denies Petitioner a just and reasonable return, constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions.

c. The Respondent Agency erroneously failed to include all property tax expenses paid by Petitioner in the current year.

d. The Respondent Agency erroneously combined certain repair and maintenance items and considered them capital improvements.

Wherefore, Petitioner prays for judgment as follows:

1. That this court issue a writ of mandate compelling Respondent to vacate and set aside its prior decision and compelling Respondent (1) to allow Petitioner to take the full rent increase that he is entitled to as determined by the MNOI procedure, said increase to be effective as of May 24, 1990, (2) to take into account the entire real property tax expense experienced by Petitioner in the current year, and (3) to correctly treat certain expenses as

repair and maintenance items as opposed to capital improvements;

2. For attorneys' fees pursuant to Code of Civil Procedure Section 1021.5 and Government Code Section 800;

3. For Petitioner's costs of suit; and

4. For such other and further relief as the court deems just and proper.

DATED: December 9, 1990.

/s/ Craig Mordoh
CRAIG MORDOH, ESQ.
Attorney for Petitioner

FILED
DEC 16 1997
CLERK

No. 97-~~582~~ 852

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

EARL W. KAVANAU,
Petitioner,
vs.
SANTA MONICA RENT CONTROL BOARD,
an agency of the City of Santa Monica, California,
Respondent.

Petition for Writ of Certiorari
to the
California Supreme Court

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, as *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

GEORGE KIMBALL*
KIMBALL & WEINER LLP
555 South Flower Street
Suite 4540
Los Angeles, California 90740
Telephone: 213/538-3800

* Counsel of Record

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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No. 97-582

In the Supreme Court

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OCTOBER TERM, 1997

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Petitioner,
VS.
SANTA MONICA RENT CONTROL BOARD,
an agency of the City of Santa Monica, California,
Respondent.

Petition for Writ of Certiorari
to the
California Supreme Court

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, as *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief is submitted with the written consent of all parties, filed with the Clerk of the Court.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Western Mobilehome Parkowners' Association ("*amicus*" or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.

[1]This brief was prepared by *amicus'* counsel, at *amicus'* expense.

WMA's members include owners and operators of more than eighteen hundred mobilehome and manufactured housing communities throughout California. For many young families and older citizens, affordable housing means manufactured housing. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Amicus recognizes that local rent controls and related regulations are facts of life in many communities. Effective legal remedies protect owners of rental property from (and help to deter) such abuses as the action of Santa Monica's elected rent board, dominated by tenant partisans, which deprived this Petitioner of $130,000.

The decision below, however, effectively revives former California precedents, overruled by this Court, that precluded compensation when private property is taken by regulation. The takings clause of the Fifth Amendment has long protected regulated businesses against confiscatory rate regulations by assuring investors a fair return and, if necessary, just compensation. California now denies any compensation, so long as the constitutional issues can be characterized as denial of due process.

STATEMENT OF THE CASE

Many communities control rents. Santa Monica's controls, adopted by initiative in 1979, are among the nation's most stringent, and have fueled extensive litigation. Many reported decisions (and scores, possibly hundreds, of unreported lower court cases) involve Santa Monica's rent law.

Santa Monica's initiative froze rents, rolled them back to levels in effect during 1978, and thereafter allowed minimal annual increases, as well as individual increases, decided upon applications, after hearing and, if necessary, an appeal to an elected rent control board. Tenants comprise a major-

ity of the local electorate. Tenant partisans dominate the rent board.

Current regulations restrict individual increases under a net operating income formula. No increase can, in any event, exceed twelve percent (12%), twice the Employment Cost Index, or $50 per month.[2]

Mr. Earl Kavanau owns ten apartments in Santa Monica, a prosperous coastal suburb of Los Angeles. His building was awash in red ink, and lost more than $98,000 in the twelve months ended October 31, 1989. Under the Board's own formula, Mr. Kavanau was entitled to $35,000 in additional rent, but the Board allowed only $5,184, because of a regulation that limited increases to 12% per annum. Additional increases were to be spread over eight years, condemning Mr. Kavanau to years of heavy losses.

In *Kavanau v. Santa Monica Rent Control Board,* 19 Cal. App. 4th 730, 23 Cal. Rptr. 2d 724 (1994) ("*Kavanau I*"), the court (1) found the 12% percent limit, as applied to Mr. Kavanau, was unconstitutional, (2) directed the lower court to issue its writ, directing the rent board to allow immediate implementation of the full increase computed by the hearing examiner, and (3) required the court, and not the board or its staff, to determine all questions that might arise concerning implementation of the increases.

These increases were prospective, so Mr. Kavanau filed suit to recover the $130,000 he had lost during the four years that elapsed after his original application. Mr. Kavanau

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[2]Santa Monica Rent Control Board (the "Board") Regulation 4107(a). At the time of Mr. Kavanau's original application, Regulation 4107(a) limited increases to "twelve percent (12%) or twice the Employment Cost Index, whichever is greater." *Kavanau v. Santa Monica Rent Control Board,* 19 Cal. App. 4th 730, 731, n.1 23 Cal. Rptr. 2d 724, 725, n.1 (1993).

reasoned that the rent board, having subjected him to confiscatory regulation, had taken his property.

Nonetheless, the California Court of Appeal and the California Supreme Court affirmed the trial court's dismissal of Mr. Kavanau's complaint. The California Supreme Court characterized the underlying imposition of confiscatory rates as a denial of due process, rather than a taking, and denied any remedy, other than further applications to the same elected Board that committed the original constitutional violation several years before.

> In this case, we need not decide whether a rent regulation that violates a particular property owner's right to due process also constitutes a taking, because, assuming it otherwise might, we hold that a remedy for the due process violation, if available and adequate, obviates a finding of a taking. . . .

66 Cal. Rptr. 672 at 686.[3]

SUMMARY OF ARGUMENT

This Court upholds price and rate regulations, so long as they allow investors in regulated businesses a fair return. This principle, long applied to public utilities, rental housing and other regulated businesses, rests upon both the due process and takings clauses of the Fifth Amendment. The state may neither deprive a citizen of property without due process of law, nor take that property for public use without paying just compensation.

The decision below reasons, in effect, that property may be taken without compensation, so long as (i) the deprivation of property can be characterized as a denial of due

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[3] Santa Monica's rent law, an initiative amendment to the city charter, makes no provision for any relief to owners in Mr. Kavanau's predicament.

process, and (ii) the affected citizen has some uncertain prospect for relief in further proceedings before the offending agency.

Price control is unconstitutional if arbitrary, discriminatory or demonstrably irrelevant to legitimate public policies. *Permian Basin Area Rate Cases,* 390 U.S. 747, 769-770 (1968). If regulated rates are insufficient, use of the regulated property is taken without just compensation. *Duquesne Light Co. v. Barasch,* 486 U.S. 299, 309 (1989). The constitutional protections are complementary, not mutually exclusive.

When private property is taken, compensation must be paid. This Court so held in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314-315 (1987) *("First English"),* rejecting California's former rule in *Agins v. Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd on other grounds,* 447 U.S. 255 (1980) that, when regulations take a citizen's property, equitable and declaratory relief were the only possible remedies, and compensation cannot be paid.

In effect, the decision below revives California's former rule in *Agins,* denying compensation for regulatory takings of property. Santa Monica has confiscated a substantial portion of Mr. Kavanau's rental income, in violation of the Constitution. This Court has held that when private property is taken, just compensation must be paid.

I.

SANTA MONICA HAS TAKEN KAVANAU'S PROPERTY.

Under the Constitution, private property may not be taken for public use without just compensation. This Court has held that the Constitution protects all property, real and personal, tangible and intangible. The term "property" as

used in the takings clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.,* 323 U.S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 377-78.

The Fifth Amendment's takings clause thus protects Mr. Kavanau, his small apartment building, and the income he receives to operate the property. Most rental properties are small businesses, owned by individuals or small partnerships. Rental properties are usually mortgaged. Owners suffering confiscatory returns risk losing the property to creditors through foreclosure or bankruptcy. In a very real sense, their property may be taken from them if regulated rents are insufficient to pay the mortgage. Mr. Kavanau evidently held on long enough to obtain some prospective relief after *Kavanau I.* Not everyone will necessarily be so fortunate.

In *Kavanau I,* the Court of Appeal determined that Santa Monica's arbitrary limitation on rent increases was confiscatory, as applied to Mr. Kavanau's small property. There can be no doubt that confiscatory regulation "goes too far." This Court long ago recognized, in a seminal opinion by Justice Holmes, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 415 (1922).

Later decisions have elaborated upon *Pennsylvania Coal,* identifying various factors that may have particular significance, including a regulation's economic impact, the extent of interference with the owner's reasonable, investment-

backed expectations, the character of the regulation, its purpose and the benefits to the owner, among others. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-25, *reh'g denied,* 439 U.S. 883 (1978).

Here, the impact of confiscatory regulations has been substantial, and might have been ruinous. Mr. Kavanau's expenditures and investment are undisputed. He was fairly entitled to expect Santa Monica's rent law to be applied constitutionally. As for character and benefit, the application of Santa Monica's arbitrary limit was confiscatory, without benefit to Mr. Kavanau. Indeed, rent control generally provides no benefits to the owners of rental property. There can be few clearer cases of regulatory taking than confiscatory application of rate regulations.

Kavanau I's determination that Santa Monica had denied Mr. Kavanau a fair return echoed decisions of this Court. More than fifty years ago, the U.S. Supreme Court interpreted a statutory "just and reasonable" standard for gas rates to assure a:

> return to the equity owner ... commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 at 603, (1944) Losses like those Mr. Kavanau suffered preclude maintenance of credit, and invite foreclosure of mortgaged property.

The Court reaffirmed these principles in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be

> confiscatory . . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.

488 U.S. at 307-308. *Duquesne* confirmed that the constitutional assurance of a fair return rests upon the takings clause of the Fifth Amendment.

California has recognized these principles in other contexts. For example, in *20th Century Insurance Co. v. Garamendi*, 8 Cal. 4th 216, 292-295, 32 Cal. Rptr. 2d 807, 855-57 (1994), a challenge to initiative regulation of consumer insurance, California's Supreme Court explained that:

> The takings clause limits the power of the states to regulate, control or fix prices that producers charge consumers for goods or services . . . The crucial question under the takings clause is whether the rate set is just and reasonable. If it is not just and reasonable, it is confiscatory . . . "A rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired' and in so doing 'practically deprive[s] the owner of property without due process of law [.]' " Thus, a producer may complain of confiscation only if the rate in question does not allow it to operate successfully. (Citations omitted.)

Mr. Kavanau's heavy losses can scarcely be described as "successful" operation. Plainly, he suffered confiscation, and thus, a taking.

II.

WHEN CONFISCATION OCCURS, COMPENSATION MUST BE PAID.

The takings clause does not prohibit appropriation of any citizen's property, but compels the state to pay compensation when property has been taken. Thus, Santa Monica must compensate Mr. Kavanau.

The decision below avoided this seemingly inescapable conclusion by declining to decide whether Santa Monica's violation of Mr. Kavanau's rights constituted both a taking and a deprivation of property without due process of law because further proceedings before the Board are a "valuable benefit that satisfies the takings clause."

Santa Monica's initiative rent control law authorizes no relief to owners in Mr. Kavanau's predicament. The opinion gives no direction, other than an admonition to consider the cost of "confiscatory rent ceilings . . . previously imposed" in any future proceedings. 66 Cal. Rptr. at 686. Mr. Kavanau has no "reasonable, certain and adequate provision for obtaining compensation". *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). He can only hope that the same Board, applying the same law, and lacking any explicit power to compensate him, will be more generous now, after two lawsuits, and eight years of proceedings in four different courts.

This Court has held, however, that when confiscation occurs, compensation must be paid. In *First English, supra*, the plaintiff church, owner of a camp in the San Gabriel Mountains outside Los Angeles challenged flood control regulations that temporarily precluded all use of the church's property. California courts denied any relief, relying upon the California Supreme Court's opinion in *Agins, supra*, "that damages are unavailable to address a 'tempo-

rary' regulatory taking." 482 U.S. at 312. This Court overruled *Agins:*

> [The Fifth Amendment] provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but places a condition on the exercise of that power .... [I]t is designed not to limit the governmental interference, but rather to secure compensation ... Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." ... [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

First English, 482 U.S. at 314-316. See also, *Presault v. Interstate Commerce Comm'n,* 494 U.S. 1, 11 (1990).

CONCLUSION

For these reasons, *amicus* respectfully requests that this Court grant Mr. Kavanau's petition for a writ of certiorari to review and overturn the decision below, which:

- Contravenes authoritative decisions of this Court,
- Implicitly revives precedents overruled by this Court, and
- Deprives Mr. Kavanau of the constitutional remedy for confiscation, merely because the underlying consti-

tutional violation can be characterized as deprivation of property without due process of law.

Dated: December 16, 1997

Respectfully submitted,

GEORGE KIMBALL
KIMBALL & WEINER LLP
Attorney for Amicus Curiae
Western Mobilehome
Parkowners' Association

Supreme Court, U.S.
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No. 97-852

In The

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,

Petitioner,

v.

SANTA MONICA RENT CONTROL BOARD,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF *AMICUS CURIAE* OF THE MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY, INC. IN SUPPORT OF PETITIONER

*David Spangenberg, State Bar #123864
Lark L. Ritson, State Bar #117614
Law Firm Of Spangenberg & Associates
285 Hamilton Avenue, Suite 430
Palo Alto, California 94301
Telephone: (650) 325-4491
Facsimile: (650) 325-4494

**Counsel of Record*

*Attorneys for Amicus Curiae
The Manufactured Housing
Educational Trust of
Santa Clara County, Inc.*

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BRIEF OF THE MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY, INC., as *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

I. Identity and Interest of the Amicus Curiae.

Amicus Curiae, the Manufactured Housing Educational Trust of Santa Clara County, Inc. ("the Trust"), is a trade organization for mobilehome parks.[2] The Trust represents the business interests of park owners, managers, and the manufactured-housing industry within the County of Santa Clara. Currently, the Trust represents 65 mobilehome parks, which include over 1100 mobilehome sites.

The majority of these sites are rent controlled. Rent control ordinances are in place throughout Santa Clara County, and in at least 90 other cities and counties of the State of California. Of 91 rent-control laws, 75 pertain *exclusively* to mobilehome parks. Other forms of rental housing in the same jurisdiction are unregulated.

Cities and counties enact rent regulations as a means of achieving affordable housing, which is a statutory requirement of their General Plans as mandated by the

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[1] The written consent to file this brief in support of the petition was granted by counsel for all parties, and has been filed with the Clerk of the Court.

[2] The Trust has not obtained financial support from any other party or organization to submit this brief. The Trust is a nonprofit, tax-exempt corporation organized under the laws of the State of California, and is located at 777 North First Street, Suite 600, San Jose, California 95112.

California Government Code.[3] Cities and counties also enact mobilehome-space rent regulations to benefit mobilehome residents, who frequently constitute a substantial voting block within the jurisdictions. "[A] primary purpose of rent control is the protection of tenants."[4]

While rent regulations are enacted for the stated legislative purpose of maintaining affordable housing for low-income and elderly citizens, rent controls are granted irrespective of renters' actual income or need for housing support. This broad grant of below-market rents differentiates rent control from other housing subsidies provided or enforced by government.

In the case of mobilehome-space rent control, unless the space control is enacted with a concurrent check on the resale price of the on-site coach, the regulation defeats its legislative purpose by inflating the resale price

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[3] *See* Cal. Gov. Code § 65302 (a) and § 65583. *See also Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 801 (1997) (*Kavanau II*), J. Baxter *dissenting*, and *citing Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 160 (1976). As noted by Justice Baxter, "rent control is constitutionally permissible precisely because it is perceived as a means by which the adverse impact on the public of a[n affordable] housing shortage may be cured or mitigated."

[4] *Kavanau II*, 16 Cal.4th at 801, J. Baxter *dissenting*, and *quoting Pennell v. San Jose*, 485 U.S. 1, 13 (1988) ["[O]ne purpose of rent control is 'to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living." *Also Pennell*, 485 U.S. at 13 , "[W]e have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare."]

of the residents' mobilehomes. The rent regulation transfers a portion of the market value of the property to the tenant, who is able to collect this premium on resale of the coach.[5]

In the Trust's opinion and experience, the blanket provision of a rent subsidy to all mobilehome residents distorts the mobilehome-housing market: While the price of the coach is inflated as a result of the below-market space rents, the income on the park owner's investment is limited – many times severely. Limiting the park's income constrains the owners' ability to maintain or improve the property, to create new mobilehome spaces, or to sell the park for a reasonable profit.[6]

The Trust believes review of the California Supreme Court's decision in *Kavanau v. Santa Monica Rent Board* should be granted.[7] Unless an adequate just-compensation remedy is enforced against rent regulation that goes too far, local governments have little or no reason not to over-zealously enforce rent controls for the benefit of voting tenants and the paper mandates of their General

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[5] *Compare Richardson v. City and County of Honolulu*, ___F.2d ___, 97 D.A.R. 11, 674 (9th Cir. Sept. 8, 1997) ["The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the [rent control] Ordinance will not substantially further its goal of affordable owner-occupied housing in Honolulu. . . . The Ordinance thus effects a regulatory taking]".

[6] *Compare Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal.App.3d 280, 293, 295 (1983).

[7] *Kavanau II*, 16 Cal.4th 761 (1997).

Plans. The *Kavanau II* decision eliminates inverse condemnation in the State of California as a means of recovering fair rents confiscated by a local government's enforcement of an unconstitutional rent regulation. The *Kavanau* decision thus forces park owners into federal courts for a just-compensation remedy, and adds to the distortion and decline of the mobilehome-park-housing market.

II. The *Kavanau* Decisions.

In 1988 Mr. Earl Kavanau purchased a 10-unit apartment building in Santa Monica, California. Over the following year, Kavanau improved the property and operated at a loss. He collected rents totaling $43,444 and spent $33,565 operating and maintaining the property. He also spent $82,934 improving the property, and $44,000 servicing debt on the property.[8]

A. *Kavanau I.*

Santa Monica's rent control ordinance provides that a landlord's rents were to be increased to maintain the base year net-operating income (MNOI), defined as gross income less operating costs and expenses. In this manner, the ordinance is intended to maintain the landlord's fair return earned presumably during the base year. At the

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[8] *Kavanau v. Santa Monica Rent Control Bd.*, 19 Cal.App.4th 730, 733 (1993) (*Kavanau I*).

time of Kavanau's apartment-building purchase, the ordinance capped all increases at 12 percent annually.[9]

In November 1989, Kavanau applied to Santa Monica's Rent Board for rent increases on nine of the apartments. The Board's hearing examiner determined Kavanau was entitled to rent increases totaling approximately $35,000 per year in order to maintain a fair return on the apartment complex. Complying with the ordinance's cap on any rent increase to 12 percent per year, the hearing examiner approved a year's rent increase totaling only $5,184. Increases to cover balance of the $35,000 were to be meted out over the next 8 years.[10]

The consequence of the 12 percent limit as applied to Mr. Kavanau was that he was to be denied the current use of the full fair rental income that the hearing examiner determined he was entitled to receive. He was also to permanently lose whatever interest or other income he would have earned on that money. Moreover, for 8 years he would have been frozen at the level of income necessary to earn a fair return in 1989, as any further increase would have been denied on the basis that he was already receiving the full 12 percent cap.[11]

Kavanau petitioned the superior court for a writ of administrative mandate, which the court denied. The Court of Appeal reversed in *Kavanau v. Santa Monica Rent Control Bd.*, 19 Cal.App.4th 730 (1993) (*Kavanau I*).

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[9] *Id.*, 19 Cal.App.4th at 732.

[10] *Id.*, 19 Cal.App.4th at 733.

[11] *Id.*, 19 Cal.App.4th at 733 n.4.

In reversing the lower court, the Court of Appeal observed that a rent regulation's "fair return on investment standard was constitutional as applied only if the regulation affords the Board sufficient flexibility to avoid confiscatory results." Santa Monica's 12 percent limit was so inflexible as to deprive Kavanau of "a just and reasonable return."[12]

The Court of Appeal remanded, instructing the Superior Court to issue a writ "commanding the Board to permit Kavanau to implement the balance remaining of the increases determined by the hearing examiner to be appropriate under the MNOI."[13] This was done. But Mr. Kavanau had lost almost $150,000 in rental income and interest between the time that Santa Monica's Rent Board capped his increase at 12 percent and the time the full rent increase was implemented under the Court of Appeal's order.[14]

B. *Kavanau II.*

The California Supreme Court denied review of *Kavanau I*, and the decision became final. Mr. Kavanau then filed the complaint underlying this petition for certiorari (*Kavanau II*).

Kavanau alleged in his complaint violations of the Due Process Clause of the Fourteenth Amendment, and the Takings Clause of the Fifth Amendment of the United

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[12] *Id.*, 19 Cal.App.4th at 735-36.

[13] *Id.*, 19 Cal.App.4th at 736-737.

[14] *Kavanau II*, 16 Cal.4th at 801, 803, J. Baxter *dissenting*.

States Constitution, as well as the equivalent clauses of the California Constitution. Kavanau sought "just compensation" in the form of lost rental income and interest caused by the temporary application of the 12 percent limit before its invalidation by the Court of Appeal.[15]

The superior court dismissed Kavanau's complaint. Pursuing the inverse condemnation claim, Kavanau appealed. The Court of Appeal affirmed on the basis of its opinion that there had been no taking because Kavanau never lost "all use of his property."[16]

The California Supreme Court granted review. The Court explained, "We granted review in order to consider whether a taking occurred and what, if any, right to just compensation Kavanau might have." The Court disagreed with the Court of appeal that "a property owner must lose all use of his property in order to have a viable inverse condemnation claim." "Nevertheless, [the California Supreme Court concluded] Kavanau is not entitled to maintain an inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process."[17]

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[15] *Id.*, 16 Cal.4th at 767-68.

[16] *Id.*, 16 Cal.4th at 768.

[17] *Id.*, 16 Cal.4th at 767-68.

III. Argument.

A. Enforcement of an unconstitutionally confiscatory rent regulation effects a taking.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[18] Where the government regulates the use of property, "compensation is required . . . if considerations such as the purpose of the regulation or *the extent to which it deprives the owner of the economic use of the property* suggest that the regulation has unfairly *singled out to bear a burden that should be borne by the public as a whole.*"[19] In the words of Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[20]

In *Kavanau I,* the Court of Appeal finally determined that Kavanau's due process rights were violated because the 12 percent cap deprived Kavanau of rents sufficient to provide a fair return on his property.[21] But in *Kavanau II,* the California Supreme Court exerts tremendous effort to avoid the logical conclusion that Santa Monica effected a

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[18] U.S. Const., 5th Amend.; *as quoted in Yee v. City of Escondido,* 503 U.S. 519, 522 (1992).

[19] *Yee v. City of Escondido, supra,* 503 U.S. at 522, italic emphasis added.

[20] *Id.,* 503 U.S. at 529, *quoting Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

[21] *Kavanau I,* 19 Cal.3d at 735-736; *Kavanau II,* 16 Cal.4th at 767, 779.

taking during the time it enforced the confiscatory rent regulation. The opinion makes little sense.

While seeking to justify its holding that a due-process invalidation remedy for confiscation of fair rents obviates a government taking, the California Supreme Court in *Kavanau II* acknowledges the overlap in due process and takings protections: "[T]he United States Supreme Court has declared that a regulation of property 'effects a taking if [it] does not substantially advance legitimate state interests,' " the *Kavanau II* Court recognizes.[22] The Court also notes, "The similarity of this takings standard to the due process requirement that a regulation 'have a reasonable relation to a proper legislative purpose' . . . supports Kavanau's argument that a due process violation in this context constitutes a taking."[23]

In the case of rent-control regulation, the Court also explains, due process guards against regulations whose methods cause confiscation of the property owner's reasonable return.[24] The takings protection guards against regulation that "goes too far" in controlling rents in order to further goals of government or "public use."[25] What the Court fails to articulate, however, is the simple fact that due process requires invalidation of rent regulations

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[22] *Kavanau II*, 16 Cal.4th at 781, *citing Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

[23] *Id.*, 16 Cal.4th at 781, *citing Nebbia v. New York*, 291 U.S. 502, 537 (1934).

[24] *Id.*, 16 Cal.4th at 770-71.

[25] *Ibid.*

which "go too far" in advancing local government's interest in affordable housing as to cause a confiscation. When a property owner is denied a reasonable return of profit on property held specifically for its rent income, very little economic use of the property remains. This fact suggests that the property owner has, indeed, been unfairly singled out "to bear a burden that should be borne by the public as a whole."[26]

In *Pennell v. San Jose*, the United States Supreme Court recognized that rent control represents "a rational scheme" when it "accommodate[s] the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring the landlords are guaranteed a fair return on their investment."[27] In *Birkenfeld v. City of Berkeley*, the California Supreme Court clearly explained:

> . . . . The provisions [of a rent control regulation] are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are *unconstitutionally confiscatory*.[28]

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[26] *Compare Yee v. City of Escondido*, 503 U.S. at 522.

[27] *Supra*, 485 U.S. at 13.

[28] *Supra*, 17 Cal.3d at 165, italic emphasis added; *see also Fisher v. City of Berkeley*, 37 Cal.3d 644, 679 (1984), *citing Cotati Alliance for Better Housing, supra*, 148 Cal.App.3d at 287, 291.

An ordinance which creates a "forced subsidy imposed on the landlord" such that it prevents the landlord from obtaining a reasonable return on property violates the Due Process Clause, which prohibit the taking of property without just compensation.[29] As a commonsense corollary to this constitutional rule, an unconstitutionally confiscatory rent-control ordinance surely must effect a taking during the time it is enforced by government. As recognized by the dissenting justices in this case, there is "no reason in law or logic why a confiscatory rent control regulation, found to be unconstitutional on due process grounds, would not result in a compensable taking if it were nevertheless enforced and a monetary deprivation resulted. [There is] no clearer example of a case where compensation should be paid then where the government has illegally taken or diverted to its own social goals the private property of one of its citizens. Indeed, such a common sense result and statement of principle should need no citation of authority."[30]

B. The Court's conclusion that the only basis of Kavanau's taking claim is the due process violation ignores the economic impact of confiscatory rent regulation.

In its efforts to relieve its cities and counties from the just compensation burden of confiscatory rent regulation,

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[29] *Kavanau II*, 16 Cal.4th at 803, J. Baxter *dissenting and quoting* Justice Mosk *dissent* in *Pennell v. City of San Jose*, 42 Cal. 3d 365, 376-377 (1986).

[30] *Id.*, 16 Cal.4th at 792-93, J. Baxter *dissenting and quoting dissenting* J. Croskey.

the California Supreme Court proposes that "the 12 percent could [constitutionally] . . . be one aspect of a comprehensive scheme that as a whole provided landlords a fair return."[31] The Court's suggestion that *Kavanau I* was wrongly decided, ignores the bare financial reality of the 12-percent-increase. As Santa Monica planned to impose the limit, Kavanau would have had to wait 8 years to bring his rents to the amount deemed a "fair return" in 1989. This financial burden is one few landlords can survive.

Dropping this line of reasoning, the California Supreme Court concedes that *Kavanau I* is a final judgment precluding relitigation. The *Kavanau II* Court thus "accept[s] as true . . . that application of the Rent Board's 12 percent limit on rent increases violated Kavanau's right to due process of law."[32] But the Court then opines, that Mr. Kavanau's allegations "if true, are not sufficient to establish a taking" under "either of the 'two discrete categories of regulatory action' that constitute a taking."[33]

The Court explains that Kavanau did not lose "all economically beneficial or productive use of" his property during the imposition of the 12 percent cap.[34] But the Court does not describe what beneficial economic use is left for a landlord owning rental property which has been

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[31] *Id.*, 16 Cal.4th at 777-78.

[32] *Id.*, 16 Cal.4th at 779.

[33] *Id.*, 16 Cal.4th at 780, *citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and *Agins v. Tiburon*, 447 U.S. at 260.

[34] *Id.*, 16 Cal.4th at 780.

controlled below a return of profit. The financial impact of Santa Monica's temporary imposition of a 12 percent cap on Mr. Kavanau was an loss of almost $150,000 in rents and interest income after expenditure of $160,444 in operation and maintenance ($33,565), capital improvements ($82,934) and debt service ($44,000).

Previously in the *Kavanau II* opinion, the Supreme Court listed the Court of Appeal's findings that Kavanau never lost "all use of his property" because he "continued to receive rents and enjoy tax benefits, and he could borrow against the property, hold it for investment, convert it to condominiums, or sell it."[35] These options, however, do not realistically show "beneficial economic use." A tax write-off generally does not provide a return on rental property otherwise run at a deficit. Since the value of mobilehome parks, and other rent-controlled properties, is usually established based on the property's income stream, mortgages against the property or a forced sell of the property do not provide for economic recovery. State and local conversion ordinances frequently prove to be financially prohibitive to conversion of the property to another use.[36] Moreover, the California Supreme Court "disagree[d] that a property owner must lose *all* use of his property in order to have a viable inverse condemnation claim."[37]

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[35] *Id.*, 16 Cal.4th at 768.

[36] *See* Cal. Gov. Code § 65863.7 allowing local governments to impose mitigation assistance to displaced residents as a condition of a mobilehome park closure or conversion.

[37] *Kavanau II*, 16 Cal.4th at 767, italic emphasis added.

The *Kavanau II* Court's pat conclusions that application of the 12 percent limit did not interfere with Kavanau's "primary expectation," did not steer private "resources to permit or facilitate uniquely public functions," or "extinguish a fundamental attribute of ownership" are equally unconvincing.[38] Kavanau's "primary expectation" was to earn income from his property, which is the fundamental attribute of rental property. This expectation and property right to rental income was taken by the city to further its social goals of maintaining affordable housing for its citizenry.

C. Future administrative rent-increase adjudications do not provide an adequate remedy for the taking.

The Fifth Amendment demands that when a government's rent regulation goes too far, just compensation must be paid. "Even if the agency withdraws the regulation," the *Kavanau II* Court recognized, "the property owner may have a right to just compensation for the temporary taking while the regulation was in effect."[39]

The California Supreme Court in *Kavanau II*, however, evades both the conclusion that an unconstitutionally-confiscatory rent regulation must surely effect a taking of the property owner's property during its enforcement, and the just-compensation consequence of

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[38] *Id.*, 16 Cal.4th at 780-781.

[39] *Id.*, 16 Cal.4th at 773, *citing First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 317, 321 (1987).

the taking. The Court concludes, "we need not decide whether a rent regulation that violates a particular property owner's right to due process also constitutes a taking." The Court explains, "assuming it otherwise might, we hold that a remedy for the due process violation, if available and adequate, obviates a finding of a taking."[40] The Court thus finds that "Kavanau is not entitled to maintain an inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process."[41]

As understood by the dissenting justices below, confiscatory rent regulation – regulation that "goes too far" in diverting private property to a government's social goals – should be recognized as a taking, and remedied through just compensation provided by the erring government.[42] But the California Supreme Court relieves local government from just-compensation liability. It does so based upon the speculative theory that confiscated rents may be recovered in the future from existing and incoming tenants.

This Supreme Court has made clear that a property owner should not be required to seek just compensation through piecemeal litigation or unfair procedures.[43] Moreover, "a reasonable, certain and adequate provision

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[40] *Id.*, 16 Cal.4th at 782.

[41] *Id.*, 16 Cal.4th at 767.

[42] *Id.*, 16 Cal.4th at 792, J. Baxter *dissenting with* J. Brown *concurring in dissent.*

[43] *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, at 350 n.7 (1986).

for obtaining compensation [must] exist at the time of the taking."[44] But the California Supreme Court's deferred "remedy" of increasing space residents' rents in the future for a local government's past enforcement of confiscatory rent regulation provides a protracted and illusory remedy. The remedy forces park owners to survive further rent loss as they submit to repetitious administrative rent-increase hearings, opposed by tenants and controlled by city and county councils bent on denying increases to maintain a stock of affordable housing.

As stated by dissenting Justice Baxter, "the majority's holding that increasing the allowable rents allowed for plaintiff's rental units is an adequate alternative to an action in inverse condemnation, rests entirely on speculation that plaintiff will someday recover the amount he allegedly lost from past tenants who will remain tenants even though the permitted rent increases will of necessity fix their rents at a figure above that otherwise permitted. It should be apparent to all that this illusory alternative remedy will not and cannot be considered an offsetting benefit that mitigates plaintiff's loss and relieves the Board of its obligation to pay for taking plaintiff's property. The increased rents "remedy" neither precludes a finding that there has been a taking nor satisfies the constitutional command that just compensation be paid when a taking occurs."[45]

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[44] *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), as *quoted in Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

[45] *Kavanau II*, 16 Cal.4th at 804, J. Baxter *dissenting with* J. Brown *concurring in the dissent.*

D. *Kavanau II* makes rent-controlled property owners' inverse condemnation claims ripe for federal adjudication.

In *Agins v. City of Tiburon*, the California Supreme Court held that property owner's had no right to bring inverse condemnation actions for a regulatory taking of property.[46] In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, this Supreme Court expressly disapproved the *Agins* rule prohibiting property owners from pursuing inverse condemnation claims.[47] But after *Agins* and before *First English*, California property owners regulatory takings claims were made ripe for federal adjudication due to the fact a just compensation remedy did not exist in California at the time the claims arose. Thus, the Ninth Circuit regularly held, "Because no remedy in inverse condemnation existed at the time of the alleged taking in this case, the district court erred in ruling that the [property owners] were required to pursue state compensation procedures before filing for federal court review."[48]

Where a state does not provide a compensation remedy for government takings or where the remedy is

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[46] *Supra*, 24 Cal.3d 266, 275-77, 157 Cal.Rptr. 372, 375-76, (1979) (*in banc*), *affirmed on other grounds*, 447 U.S. 255 (1980).

[47] *Supra*, 482 U.S. at 310-311.

[48] *Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989); *accord Del Monte Dunes at Monterey v. City of Monterey*, *supra*, 920 F.2d at 1507.

inadequate, a property owner's claim for inverse condemnation is ripe for federal adjudication.[49] In *Kavanau II*, the California Supreme Court has foreclosed property owners from seeking just compensation for takings caused by the enforcement of confiscatory rent regulations.[50] Just as Mr. Kavanau is turning to this Supreme Court for relief from the denial of just compensation in this instance, mobilehome parks and other rent-controlled property owners will turn to federal courts for a fairer resolution of their right to receive a fair return through enforcement of an actual and adequate just-compensation remedy.

IV. Conclusion.

Unless Fifth Amendment Takings Clause scrutiny is provided by the courts – and enforced with a just compensation remedy – local governments have little reason to do other than regulate rents at levels that put the property owner's fair return to the government's use. In the context of mobilehome-space rent control, the end result of this confiscatory rent-control regulation is a depletion of mobilehome park housing as parks are driven from business, and an increase in federal court litigation. As a representative of the mobilehome park industry, the Trust respectfully urges this honorable

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[49] *Ibid.*

[50] 16 Cal.4th at 767.

United States Supreme Court to accept Mr. Kavanau's petition for review.

Dated: December 23, 1997.

Respectfully submitted,

*David Spangenberg, State Bar #123864
Lark L. Ritson, State Bar #117614
Law Firm of Spangenberg & Associates
285 Hamilton Avenue, Suite 430
Palo Alto, California 94301
Telephone: (650) 325-4491
Facsimile: (650) 325-4494

**Counsel of Record*

Attorneys for Amicus Curiae
The Manufactured Housing
Educational Trust of
Santa Clara County, Inc.

Supreme Court, U.S.
FILED
JAN 5 1998
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(5)

No. 97-852

In the

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,
Petitioner,

v.

SANTA MONICA RENT CONTROL BOARD,
an Agency of the City of Santa Monica,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
*R.S. RADFORD
*COUNSEL OF RECORD
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Attorneys for Petitioner

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Rule 15.6 1

In accordance with Rule 15.6 of the United States Supreme Court Rules, petitioner Earl W. Kavanau files this reply brief to respond to additional issues raised by respondent in opposition to Mr. Kavanau's Petition for Writ of Certiorari.

This case squarely presents a plaintiff who has obtained a final judicial determination that he has suffered a temporary regulatory taking, but who has been denied his Fifth Amendment right to just compensation by the highest court of his state. The decision below forecloses just compensation to California plaintiffs who are subjected to regulatory takings so long as a due process remedy may be available, thereby forcing such plaintiffs to seek redress in federal court.

Respondent Santa Monica Rent Control Board (Rent Board) argues for the first time that the California Court of Appeal in *Kavanau v. Santa Monica Rent Control Board*, 19 Cal. App. 4th 730 (1993) (*Kavanau I*), established that Earl Kavanau "lost the takings issue and won the due process issue" and was therefore not entitled to just compensation.[1] This is a plain misrepresentation of the court of appeal's holding in that case, which established as a matter of law that Mr. Kavanau suffered an uncompensated regulatory taking of his property.

Similarly, the Rent Board argues for the first time that Mr. Kavanau is not entitled to just compensation in an inverse condemnation proceeding because he was not awarded compensation via an administrative writ.[2] This argument distorts and implicitly misrepresents California procedural law, under which just compensation for an as-applied regulatory taking can only be sought via an inverse condemnation claim joined with or subsequent to an administrative writ petition.[3] In fact, Mr. Kavanau's handling of this case has been singled out by the

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[1] Respondent's Brief in Opposition to Petition for Writ of Certiorari (Resp. Brief) at i.

[2] *Id.* at 2.

[3] *See Hensler v. City of Glendale*, 8 Cal. 4th 1, 21-28 (1994).

California Court of Appeal as a paradigm example of the correct way to pursue a regulatory takings claim under the procedures required by California law.[4]

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL IN *KAVANAU I* DETERMINED THAT THE RENT BOARD'S ACTIONS EFFECTED A REGULATORY TAKING FOR WHICH JUST COMPENSATION HAS NEVER BEEN PAID

The Respondent's Brief repeatedly misrepresents to this Court the holding of the California Court of Appeal in *Kavanau I*:

> [Petitioner] lost the takings issue and won the due process issue.[5]
>
> On appeal, the Court of Appeal reversed on the due process claim.[6]
>
> All three courts below . . . held that just compensation was not available because Petitioner had not suffered a taking.[7]
>
> Petitioner brought both a takings and due process claim, but succeeded solely on due process grounds.[8]

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[4] *See Santa Monica Beach v. Superior Court*, 50 Cal. Rptr. 2d 726, 732 n.3 (1996) (rev. granted May 29, 1996). A copy of the *Santa Monica Beach* opinion is reprinted as the Appendix to this brief.

[5] Resp. Brief at i.

[6] *Id.* at 2.

[7] *Id.* at 3.

[8] *Id.* at 11.

As the Appendix to the Respondent's Brief illustrates, Mr. Kavanau's petition in the trial court alleged that a common set of facts comprised both a taking and a due process violation, in recognition of the fact that the Takings Clause of the Fifth Amendment is applicable to the states only via the Due Process Clause of the Fourteenth Amendment.[9] These allegations were denied in their entirety by the trial court,[10] and that decision in turn was reversed in its entirety by the court of appeal.[11] There was no separate cause of action in the administrative writ petition for a due process violation, and nothing in the court of appeal's decision addresses the Due Process Clause independently of the Rent Board's violation of the Takings Clause.

In support of its revisionist reading of *Kavanau I*, the Rent Board now asserts that the court of appeal did not find the Rent Board had deprived Mr. Kavanau of economically viable use of his property.[12] Yet, in fact, that is precisely what *Kavanau I* established. This Court first enunciated the standard that a regulation effects a taking if it deprives an owner of economically viable use of his property in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In that seminal case, "economically viable use" was taken as synonymous with the owner's ability to earn a fair return on commercial real estate.[13] *Kavanau I* expressly found that "[i]t is not and could not be disputed that Kavanau could not obtain a fair return under the Board's approach."[14] Thus, contrary to the Rent Board's assertion, the court of appeal in *Kavanau I* established that Mr. Kavanau had suffered a regulatory taking under the analysis employed by this Court in *Penn Central*.

---

[9] Appendix to Respondent's Brief (Resp. App.) at 4, ¶¶ 10a, 10b.

[10] Appendix to Petition for Writ of Certiorari (Pet. App.) at E-3.

[11] *Id.* at E-6.

[12] Resp. Brief at 7.

[13] *Penn Central*, 438 U.S. at 138 n.36.

[14] Pet. App. at E-8 n.7.

Finally, the Rent Board cites *Tibbs v. Florida*, 457 U.S. 31 (1982), for the proposition that this Court is bound by the California Supreme Court's mischaracterization of *Kavanau I* as a due process decision.[15] In fact, *Tibbs* holds that a court's *own* resolution of an ambiguity in a prior opinion *of the same court* should be taken as dispositive.[16] Thus, under *Tibbs*, any ambiguity as to whether *Kavanau I* found a taking was conclusively resolved when the same appellate panel subsequently cited to *Kavanau I* as having establishing a regulatory taking:

> [In *Kavanau I*] ***a taking was . . . determined in a judicial proceeding.***[17]

Thus, the Rent Board's assertions that *Kavanau I* was decided on due process grounds are contradicted both by the plain language of that opinion and by the court of appeal's subsequent assessment of its own decision. The California Supreme Court was presented with a final judicial determination that a regulatory taking had occurred, yet held that a compensation remedy was not available if a due process remedy could be devised.

II

JUST COMPENSATION WAS NOT AWARDED ON MR. KAVANAU'S ADMINISTRATIVE WRIT PETITION BECAUSE, UNDER CALIFORNIA'S PROCEDURAL SCHEME, THIS REMEDY MUST BE PURSUED VIA A FOLLOW-ON INVERSE CONDEMNATION ACTION

The Rent Board implies that Mr. Kavanau was not entitled to seek just compensation via inverse condemnation because "the sole remedy awarded by the Court of Appeal [in

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[15] Resp. Brief at 3 n.6.

[16] *Tibbs*, 457 U.S. at 46-47.

[17] *Santa Monica Beach*, 50 Cal. Rptr. 2d at 732 n.3 (emphasis added).

Kavanau I] was mandamus."[18] What the Rent Board does not point out, but is obvious from the Appendix to the Respondent's Brief, is that mandamus is the normal relief granted on the pleading Mr. Kavanau filed in the trial court--a Petition for Writ of Administrative Mandate.[19]

It is simply untrue that Mr. Kavanau "elected" to pursue his inverse condemnation claim concurrently with his administrative writ petition "but did not prevail," as the Rent Board falsely asserts.[20] As can be seen by examining the Appendix to the Respondent's Brief, no such concurrent claim was made. No inverse condemnation complaint was set out in the petition filed with the trial court in 1990, and no prayer for just compensation was set forth. Instead, in keeping with the procedures established by the California Supreme Court in *Hensler v. City of Glendale*,[21] Mr. Kavanau first established that the Rent Board had effected a taking via an administrative writ action and then sought just compensation by filing a subsequent inverse condemnation complaint.

The Rent Board distorts the Byzantine procedural obstacles California courts have placed in front of takings claimants to suggest that Mr. Kavanau's filing of a second complaint in this matter somehow indicates he must have done something wrong the first time. Yet, in fact, Mr. Kavanau complied to the letter with the onerous procedural requirements established by the California Supreme Court for prosecuting regulatory takings claims.

In a 1996 opinion, the California Court of Appeal expressly singled out the *Kavanau* litigation as a textbook example of correct procedure under existing California law:

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[18] Resp. Brief at 2.

[19] Resp. App. at 1.

[20] Resp. Brief at 11.

[21] 8 Cal. 4th at 21-28.

> Aside from potential problems created by the applicable statute of limitations, the property owner has the option of filing his administrative mandate petition first and then, if he prevails, pursuing his inverse condemnation claim in a separate action. For example, in *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal. App.4th 730, 23 Cal.Rptr.2d 724, we held that an apartment owner's petition for writ of mandate should have been granted on the ground that Santa Monica's rent control law, as applied to Mr. Kavanau, unconstitutionally deprived him of a fair return. *Assuming that Mr. Kavanau timely pursued a claim for inverse condemnation in a separate action, the trial court would then have before it a case in which a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled.*[22]

In short, the fact that Mr. Kavanau did not seek or receive just compensation in his initial administrative writ petition says nothing whatsoever about his constitutional right to be compensated once a taking was established in *Kavanau I*. The California Supreme Court confirmed this Fifth Amendment right in *Hensler* (providing rigorous procedural requirements are met) but snatched it away in the decision below.

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[22] *Santa Monica Beach v. Superior Court*, 50 Cal. Rptr. 2d at 732 n.3 (emphasis added, citations omitted).

III

THE CONFLICT BETWEEN THE CALIFORNIA SUPREME COURT AND THE NINTH CIRCUIT IS REAL AND SHOULD BE RESOLVED BY THIS COURT

The Respondent's Brief argues that there is no genuine conflict between the decision below and the Ninth Circuit Court of Appeals' holdings in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1994), *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996), and *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997).[23] However, the Rent Board's attempt to distinguish these cases rests wholly on the superficial factual distinction that none of the Ninth Circuit cases involved the application of a rent control ordinance.[24]

The Ninth Circuit has ruled unequivocally that due process complaints will be dismissed if they could be recharacterized as regulatory takings claims.[25] In contrast, the California Supreme Court in the decision below ruled that a plaintiff may not obtain a regulatory takings remedy if his complaint could be recharacterized as a due process claim.[26]

On the facts of this case, Mr. Kavanau would have a takings claim dismissed in state court because a due process remedy may be available and would have a due process claim dismissed in federal court because he could have alleged a taking. This is a classic example of the type of conflicting and inconsistent application of the law that should be resolved by action of this Court.

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[23] Resp. Brief at 10-12.

[24] *Id.* at 12 ("none of the three Ninth Circuit cases . . . held . . . that a due process remedy is not available in ratemaking [*sic*] cases").

[25] *See Armendariz*, 75 F.3d at 1318, 1325-26; *Patel*, 103 F.3d at 874-75; *Macri*, 110 F.3d at 1498-99.

[26] Pet. App. at A-20-21.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, petitioner respectfully asks that the petition be GRANTED.

DATED: January, 1998.

Respectfully submitted,

JAMES S. BURLING
*R.S. RADFORD
*COUNSEL OF RECORD
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Attorneys for Petitioners

APPENDIX

50 Cal. Rpt. 2d 726
Previously published at 42 Cal. App. 4th 1228

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

No. B097056.

Court of Appeal, Second District, Division 1, California.

Feb. 27, 1996.

As Modified on Denial of Rehearing March 20, 1996.

Review Granted May 29, 1996.

Property owner filed combined complaint for inverse condemnation and petition for writ of administrative mandate, claiming city rent control ordinance was compensable regulatory taking of owner's property. The city rent control board demurred, claiming, as a matter of law, that property owner could not prevail on inverse condemnation claim. The Superior Court, Los Angeles County, No. SS005266, Alan B. Haber, J., sustained demurrer without leave to amend, but left administrative mandate petition for later determination. Property owner petitioned for writ of mandate, and Court of Appeal issued order to show cause. The Court of Appeal, Miriam A. Vogel, J., held that: (1) demurrer was improperly sustained, and (2) appropriate standard to apply in determining whether property owner had compensable regulatory taking claim was whether ordinance went too far by denying

owner economically viable use of land without substantially advancing reasonably *727 necessary and legitimate state interest.

Writ issued.

*728 Original Proceeding; application for writ of mandate, Alan B. Haber, Judge. Writ granted.

Pacific Legal Foundation, James S. Burling, R.S. Radford and Victor J. Wolski, for Petitioner.

No appearance for Respondent.

Anthony A. Trendacosta, General Counsel, Los Angeles, and Ralph H. Goldsen, Staff Attorney, San Francisco, for Real Party in Interest.

MIRIAM A. VOGEL, Associate Justice.

Santa Monica Beach, Ltd. (SMB) filed a combined complaint for inverse condemnation and petition for a writ of administrative mandate, naming the Santa Monica Rent Control Board as defendant and respondent and contending that, as applied to SMB, the City of Santa Monica's rent control law constitutes a compensable regulatory taking of SMB's property. The Board demurred, contending that, as a matter of law, SMB could not prevail on its inverse condemnation claim because there was a "rational basis" for the taking (that is, for the limits imposed by the rent control law). The trial court agreed and sustained the demurrer without leave to amend, leaving the administrative mandate petition to be heard at a later date. Because the two claims are inextricably related, SMB thereupon filed a petition for a writ of mandate, and we issued an order to show cause.

*729 For the reasons explained below, we conclude that the question is not one that can be decided by way of a demurrer--but that when it is properly before the trial court, the question is not whether there was a "rational basis" for the legislative enactment. Instead, the question is whether the statute "goes too far," which it does if (1) it denies an owner the economically viable use of its land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, factors determined by the trial court's consideration of (a) the economic impact of the regulation on the owner,

(b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the regulation, and (e) the nature and importance of the public interests which the regulation serves.

BACKGROUND[1]

A.

In April 1979, the City of Santa Monica adopted a rent control charter amendment and created an elected Rent Control Board to regulate rentals. Among other things, the City's rent control law requires that owners register each rental unit and pay annual registration fees to the Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specified reasons, and prescribes remedies for violations of its provisions.

This was the stated purpose of the charter amendment: "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. *These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens*. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." (Emphasis added.)

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[1] As always, on review of the propriety of a ruling on a demurrer, we presume the truth of the complaint's properly pleaded facts. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Statements of fact within quotation marks are taken from SMB's first amended complaint.

Between 1980 and 1990, during which time the City's rent control law was continuously in effect, the City's stock of rental housing units declined by nearly 5 percent and the City experienced a loss of 775 low-income rental units (a 12 percent decline) notwithstanding that, during the same period, the rental housing supply and the number of low-income rental units *increased* in all comparable non-rent-controlled Southern California cities. The City also lost 285 "very low-income" rental units, the largest "exodus of economically disadvantaged renters" from *any* comparable Southern California city. At the same time, the City experienced a 37 percent *increase* in the proportion of households with very high incomes (while the proportion of very high-income households *dropped* by more than 8 percent in Los Angeles County as a whole). In addition, rental housing in Santa Monica has become "increasingly unavailable" to young families, with the number of family households with children declining by 1,299, a 6 percent drop during a period when no comparable non-rent-controlled Southern California city lost young family households.

"The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27 [percent], despite an *increase* in such households in Los Angeles County as a whole. ¶ Under rent control, Santa Monica's elderly population (aged 65 and over) declined by 1.7 [percent] between 1980 and 1990. This decrease ***730** is especially remarkable because the elderly population of Los Angeles County *rose* by more than 15 [percent] over the same decade. The elderly population increased over this period in every comparable [Southern California] city without rental control . . . ."

In short, SMB alleges, Santa Monica's rent control law has failed to mitigate the effects of "a growing shortage of housing units" by assisting "the poor, minorities, students, young families and senior citizens" and, to the contrary, it has made things worse.

B.

In March 1992, SMB (the owner of a 12-unit residential rental property in the City of Santa Monica) filed a petition asking the Board for permission to increase its rents. To prevail, SMB had to prove that its property was producing less than a "fair return" under "a

comparative Net Operating Income (NOI) analysis that compares the NOI of calendar year 1978 to that of calendar year 1991, the most recent year prior to the filing of" SMB's 1992 petition. In May, after an administrative hearing, the Board's hearing examiner found that SMB's operating expenses for the base year of 1978 were $14,879 but that SMB was not entitled to a rent increase. SMB appealed to the Board, without success.

While SMB's 1992 petition was pending, three things happened. First, SMB (along with all Santa Monica landlords covered by the City's rent control law) became entitled to a "full general rent adjustment" effective September 1, 1992. Second, the Board modified its regulations so that, in the future (but not retroactively), a landlord's operating expenses could be calculated by separating insurance costs from other administrative management costs. Third, the Board "extensively modified" Regulation 4108 which, as originally adopted, had *temporarily delayed* implementation of general rent adjustments in cases where owners received large rent increases. The revised Regulation 4108, as adopted on June 3, 1992, *permanently denies* up to one year of future general rent adjustments in the event an owner is entitled to *any* rent increase, no matter how small the amount.

On March 30, 1993, SMB filed a second petition with the Board, this time asking for permission to increase its rents based upon its income and expenses for 1992. A hearing examiner found that SMB was entitled "to a permanent rent increase of $3 per unit per month and temporary rent increases averaging $58 per unit per month." SMB appealed to the Board, contending (1) the hearing officer had improperly considered income from parking spaces rented separately from SMB's apartments (parking spaces are not covered by the City's rent control law), (2) the hearing examiner's determinations were contrary to the determinations made by the hearing examiner who heard SMB's 1992 petition, and (3) the hearing examiner improperly applied Regulation 4108 to reduce SMB's rent increase entitlement based on SMB's 1992 NOI and to permanently deny SMB three-fourths of the general rent adjustment to be implemented in 1993 and 1994. The Board affirmed the hearing examiner's determinations.

Based upon these allegations, SMB claims the Board has, by application of the City's rent control law, violated SMB's Fifth

Amendment rights under the United States Constitution and its rights under article I, section 19 of the California Constitution (the takings clauses). Specifically, SMB claims the City's rent control law does not meet the "substantial advancement" test articulated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834-837 (discussed at length below), because the rent control law fails "to substantially mitigate some social harm that would otherwise result from the [property] owner's unregulated use of [its] property" and by "fail[ing] in practice to advance the specific purpose stated in the regulation."

In its cause of action for inverse condemnation, SMB then alleges: "Because [the Board's] application of the [rent control law] has reduced the availability of private rental housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing, the [rent control law] is not *731 substantially advancing its stated purpose of implementing the housing policies of the [C]ity with regard to these population groups. ¶ The . . . Board's final determination regarding [SMB's 1993 petition] does not substantially advance a legitimate governmental interest, nor is there any close nexus between the denial of [SMB's] application for a fair rate of return on capital investments and any public harm that might result from [SMB's] unregulated operation of [its] property, because unregulated use of [its] property by [SMB] would not have resulted in the problems allegedly addressed by the [rent control law], i.e., a shortage of available housing for low-income renters, young families, and the elderly."

Additional allegations within the inverse condemnation cause of action charge the Board with denying SMB a fair return on its investment and depriving SMB of "essential attributes of ownership of its property, including the right to exclude others and the right to determine the terms upon which leasehold interests in [SMB's] property will be alienated." SMB "has received no compensation for the damages inflicted by [the City's] application of the [rent control law] to [SMB's] property, and the [rent control law] contains no provision for seeking or obtaining compensation."

For each and all of these reasons, SMB alleges, the Board's application of the City's rent control law to SMB's property "comprises a regulatory taking of [SMB's] property for public use without just

compensation . . . . ¶ A trial de novo is necessary to examine the constitutional issues in this case. The administrative record compiled by the Rent Board is inadequate for this purpose because the Rent Board does not conduct the kind of judicial proceedings needed to safeguard [SMB's] fundamental right to due process of law or its right not to be deprived of its property without just compensation. . . ."[2]

C.

The Board demurred to SMB's inverse condemnation cause of action, contending (among other things) that the rent control law need not "substantially advance" the stated purpose of the law and that where, as here, a regulatory taking is alleged, this "heightened scrutiny" is not required. Moreover, claimed the Board, an inverse condemnation claim cannot be based upon a "temporary regulatory diminution of income or value." In short, the Board's position was (and is) that, as a matter of law, SMB has no right to claim damages on an inverse condemnation theory.

The trial court accepted the Board's position and sustained the demurrer without leave to amend because "the rational basis test applies to regulatory takings." An order dismissing SMB's inverse condemnation cause of action was thereafter signed and filed, leaving SMB with its petition for administrative mandate still to be determined. Because the two claims are inextricably related, SMB asked us to intervene and review the trial court's ruling at this stage of the proceedings. We agreed and issued an order to show cause, to which the Board has responded. For the reasons we will now explain, we grant the writ as prayed.

DISCUSSION

I.

We begin by stating the obvious. First, all it takes to plead a cause of action for inverse condemnation are allegations of (1) the plaintiff's

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[2] As noted at the outset, SMB's complaint is combined with a petition for a writ of administrative mandate. That cause of action (which is not before us at this time) alleges with specificity that the Board acted without or in excess of its jurisdiction in denying SMB's request for permission to increase its rents.

ownership of described property, (2) a governmental taking by actual possession or by regulation, and (3) substantial damage to the plaintiff's property. (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 641, pp. 91-92.) Second, where (as here) the existence of a regulatory taking has not previously been judicially determined, an action for inverse condemnation is properly joined with a petition for a writ of administrative mandate. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 13-16).[3] *732 Third, by its demurrer, the Board has conceded (for present purposes) the truth of SMB's factual allegations and we

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[3] Aside from potential problems created by the applicable statute of limitations (as in *Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 21-28), the property owner has the option of filing his administrative mandate petition first and then, if he prevails, pursuing his inverse condemnation claim in a separate action. For example, in *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal. App.4th 730, we held that an apartment owner's petition for writ of mandate should have been granted on the ground that Santa Monica's rent control law, as applied to Mr. Kavanau, unconstitutionally deprived him of a fair return. Assuming that Mr. Kavanau timely pursued a claim for inverse condemnation in a separate action, the trial court would then have before it a case in which a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled. (*Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 13-17 [a regulatory taking may be challenged by declaratory relief or by a petition for a writ of administrative mandate, either of which may be joined with or followed by an action for inverse condemnation]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal. App.4th 592, 607 [where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency, "the proper procedure is to bring the inverse condemnation action in conjunction with, or after, a petition for administrative mandamus, . . . the procedure generally required when the validity or propriety of an action or determination by an administrative agency is challenged"]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170.)

therefore presume there has, in fact, been a regulatory taking of SMB's property, the extent of which remains to be determined at trial. (*Moore v. Regents of University of California, supra*, 51 Cal.3d at p. 125; *Lacher v. Superior Court* (1991) 230 Cal. App.3d 1038, 1043[in ruling on a demurrer, the trial court is prohibited from considering whether the plaintiff will be able to prove its claim or the difficulty it may have in doing so].) Fourth, a partial or temporary regulatory taking is still a "taking" which will support an inverse condemnation claim. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321; *Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1171.)

For these reasons, it is clear the demurrer was improperly sustained. In short, the question whether the facts alleged by SMB are sufficient to establish the sort of regulatory taking which will entitle it to damages on an inverse condemnation theory was not something the trial court could or should have answered at this stage of the proceedings.

II.

Since the trial court's comments (as well as its ruling) reflect its uncertainty about the standard ultimately to be applied in this case, and since we have the issue squarely before us and fully briefed by both sides, we have concluded that this is an appropriate stage of these proceedings at which to address the merits of this issue.

A.

To the extent the Board contends that not every governmental regulation supports a taking claim, it is correct. To the extent it contends that all that is required is some vague, unarticulated rational connection between the regulation and the limitation on a property owner's rights vis-à-vis its property, the Board is wrong. If SMB can prove that Santa Monica's rent control law "goes too far" in the manner explained below, SMB will have established the "taking" element of its inverse condemnation cause of action--notwithstanding that the City may be able to show that there was a "rational basis" for the law when it was adopted.

B.

As our Supreme Court explained in *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pages 9-10 (quoting *Yee v. Escondido* (1992) 503 U.S. 519, 522-523), a regulatory taking differs from the classic physical invasion of private property that historically formed the basis of ***733** an inverse condemnation claim: "'Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.'"[4]

Where (as in our case) the inverse condemnation claim is based upon a regulatory taking, "[a]n individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking." (*Hensler v. City of Glendale*, *supra*, 8 Cal.4th at p. 10.) In short, the determination whether a regulatory taking is compensable is fact-driven and must be decided on a case by case basis. (*Id.* at p. 12 [compensation need not be paid unless the regulation fails to serve an important governmental purpose or goes too far as applied to specific property]; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [while property may be regulated to a certain extent, if the regulation "goes too far" it will be recognized as a taking]; see also *MacDonald, Sommer &*

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[4] As the Supreme Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, there are really three categories of takings: (1) an outright physical taking (e.g., flooding, destruction or physical occupation by government); (2) physical taking by regulation (e.g., regulatory measures authorizing permanent physical use of property by third parties); and (3) pure regulatory takings (i.e., regulations prohibiting or requiring certain uses of property by its owner). The first two categories always require compensation. As we will explain, the determination whether the third category constitutes a compensable taking depends on the facts of each case.

Frates v. Yolo County (1986) 477 U.S. 340, 348 [a court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes].)

C.

How do we determine whether a regulation "goes too far?"[5] We know that it does *not* go too far if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Conversely, we know that it *does* go too far if it is "not reasonably necessary to the effectuation of a substantial government purpose." (*Nollan v. California Coastal Comm'n. supra,* 483 U.S. at p. 834, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 127.)

In *Nollan*, the question was whether the California Coastal Commission could require an applicant for a building permit to dedicate part of his land as an easement for public access to the beach. (*Nollan v. California Coastal Comm'n*, supra, 483 U.S. at p. 834.) Since the Supreme Court concluded that such a permit condition could not pass constitutional muster under *any* standard, it was unnecessary for the Court to articulate the precise test to be applied to determine when a regulation "goes too far." But the Supreme Court did use Nollan to *expressly reject* the Coastal Commission's contention that the test for a "taking" is whether the state, in the exercise of its police power, "could rationally have *734 decided" the permit condition

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[5] The Supreme Court did not consider this issue in *Hensler*. There, the distinction between possessory and regulatory takings was necessary to determine the nature of the plaintiff's claim, a prerequisite to the determination of the time at which the applicable statute of limitations runs when the challenge is to the facial validity of a land-use regulation (the answer on the facts of *Hensler* was that it runs from the date the statute became effective). (*Hensler v. City of Glendale, supra,* 8 Cal.4th at p. 22.) Thus, although *Hensler* provides the framework for our discussion, it does not answer the specific issue raised by SMB's petition.

might achieve the state's objective. (*Ibid.*) That, at least, disposes of the "rational basis" test adopted by the trial court in our case.

In our view, *Nollan* left in place the tests previously articulated in *Agins v. Tiburon, supra*, 447 U.S. at p. 260, and *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. at pp. 125-127. What this means is that a statute "goes too far" and thus supports a compensable regulatory taking claim if (1) it denies an owner the economically viable use of his land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, issues to be determined by the trial court's consideration of (a) the economic impact of the regulation on the owner, (b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the regulation, and (e) the nature and importance of the public interests which the regulation serves.

In *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 169-171, Division Three of the First District held that "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases." As our Supreme Court recently explained, however, while "[t]here is no question that the takings clause is specially protective of property against *physical occupation* or invasion," and no question that the government "generally has greater leeway with respect to noninvasive forms of land use regulation" where the "'extortionate' use of the police power to exact unconstitutional conditions is not present," *Blue Jeans* must be limited to its facts and where (as here) it is alleged that a monetary exaction is imposed "on an individual and discretionary basis, . . . the heightened standard of judicial scrutiny of *Nollan* and *Dolan [v. City of Tigard* (1994) 512 U.S. ___ [129 L.Ed.2d 304, 317]] is triggered." (*Ehrlich v. City of Culver City* (Mar. 5, 1996, S033642) ___ Cal.4th ___ [slip opn., pp. 24-25].)[6] While we do not question the basic rule

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[6] In *Dolan*, a case involving conditions imposed upon a property owner who wanted to double the size of her retail store and pave over her parking lot, the Supreme Court held that, to avoid a "taking" claim, the City of Tigard would have to demonstrate not only (1) that an *essential nexus* existed between the legitimate state interests involved and the

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that not every regulation results in a compensable taking, we believe the trend toward more far-reaching (and numerically more) socially engineered land-use regulations supports our interpretation of *Nollan* and our conclusion that its rules apply to the type of regulatory taking at issue in this case. And although *Blue Jeans* as written might arguably have supported a different conclusion, the manner in which it has been construed by the Supreme Court makes it entirely consistent with the result we reach in this case.[7]

III.

If, at trial, SMB is able to establish that Santa Monica's rent control law "goes *735 too far," the fact that rent control ordinances

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[6] (...continued)
permit conditions (a requirement previously imposed by *Nollan*), but also (2) that there was a *rough proportionality* between the exactions and the projected impact of the proposed development. (*Dolan v. City of Tigard, supra*, 512 U.S. at p.__ , [129 L.Ed.2d at pp. 317-320].) In *Yee v. Escondido, supra*, 503 U.S. at pp. 533-538, where several mobilehome park owners challenged a mobilehome park rent control ordinance as a regulatory taking, the Supreme Court refused to decide the issue now before us because it had not been raised below but suggested, in dicta, that the analysis would be whether there was "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."

[7] When we filed this opinion, *Ehrlich* was still pending before the Supreme court. After the Supreme Court filed *Ehrlich*, the Board filed a petition for rehearing in which it suggested that our opinion was inconsistent with *Ehrlich*. We disagree. *Ehrlich* applies the heightened scrutiny test of *Nollan* and *Dolan* to a monetary exaction imposed by a city as a condition of approving a rezoning request and expressly rejects the suggestion that "the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies *only* to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval." (*Ehrlich v. City of Culver City, supra*, --- Cal.4th at p.__, [slip opn. at p.2.].) Thus, to the extent *Ehrlich* addresses the issue now before us, it is entirely consistent with the result we reach.

have been upheld against facial constitutional challenges (e.g., *Pennell v. San Jose* (1988) 485 U.S. 1; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184; *Yee v. Escondido, supra*, 503 U.S. 519; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165) does not preclude a finding that Santa Monica's ordinance is unconstitutional as applied to SMB. (*Pennell v. San Jose, supra*, 485 U.S. at pp. 10-11; cf. *Healing v. California Coastal Com., supra*, 22 Cal.App.4th at pp. 1166-1168.)

For the record, we note that if SMB can prove what it has pleaded, it would win even on the "rational basis" test rejected in *Nollan*. If, in fact, Santa Monica's rent control law has reduced rather than increased the number of rental units available to those intended to be benefited by that law, then the regulation has no relationship (nexus) at all to its stated purpose. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose. As was said in *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 296, and adopted by us in *Kavanau v. Santa Monica Rent Control Bd., supra*, 19 Cal.App.4th at p. 736, "the purpose of rent control is not to make the landlord a private guarantor of affordable housing for tenants, nor is it to bring about such a degree of decreased maintenance and services as to diminish the quality of housing available. The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community."[8]

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[8] In *McDougal v. County of Imperial* (9th Cir.1991) 942 F.2d 668, 676, the Ninth Circuit rejected the notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property . . . . [W]e believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." In *Healing v. California Coastal Com., supra*, 22 Cal.App. 4th at p. 1174, we explained that, "[t]o resolve this issue, evidence must

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And, as one commentator put it, "[w]ith the possible exception of a short-term response to a wartime emergency, the traditional objectives of rent control are highly vulnerable to attack under *Nollan's* substantial advancement test. Responding to housing shortages or redistributing wealth may be regarded as legitimate state interests, but rent control generally fails to substantially advance these goals. Conversely, the political objectives that are furthered by rent control are of dubious legitimacy . . . ." (R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control* (1992) 21 Sw.U.L.Rev. 1019, 1065, fns. omitted.)

The bottom line, therefore, is this: If SMB establishes (as it has alleged) that Santa Monica's rent control law "goes too far" as applied to SMB, SMB will have established a compensable regulatory taking.[9]

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[8] (...continued)
be considered." Quoting *McDougal*, we continued: "'The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owner's] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.'" (*Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1174, quoting *McDougal v. County of Imperial, supra*, 942 F.2d at p. 680.)

[9] In its return to SMB's petition, the Board contends that SMB's inverse condemnation complaint is barred by the applicable statute of limitations and by SMB's failure to exhaust administrative remedies. By implication, the trial court rejected these arguments when it sustained the Board's demurrer solely on the ground discussed in this opinion. Since these are fact-based issues which could not, in any event, be determined by demurrer, the trial court's order cannot be sustained on either of these alternative grounds. Because these and perhaps other issues not raised in these writ proceedings remain to be determined, our disposition refers to "if" and when this case is tried (rather than assuming it absolutely will be tried).

***736. DISPOSITION**

Let a peremptory writ issue commanding the trial court (1) to vacate its orders sustaining the Board's demurrer to SMB's inverse condemnation action and dismissing that portion of SMB's complaint; (2) to enter a new order overruling the Board's demurrer and directing the Board to answer within the time specified by the trial court; and (3) if and when SMB's inverse condemnation action is tried, to determine the taking issue according to the standard articulated in this opinion.

ORTEGA, Acting P.J. and MASTERSON, J., concur.